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Intracorporate Plurality in Criminal Conspiracy Law

By

SARAH N. WELLING*

The concept of conspiracy currently plays a significant role in three areas of substantive law: antitrust, civil rights, and criminal law. Although the role of conspiracy in these substantive areas of law differs in many ways, all three require that the conspiracy consist of a plurality of actors. Determining what constitutes a plurality of actors when all the alleged conspirators are agents¹ of a single corporation poses a continuing problem.

This problem raises two distinct questions. The first is whether, when one agent acts alone within the scope of corporate business, the agent and the corporation constitute a plurality. The second question is whether, when several agents of a single corporation act together in furtherance of the corporation's business, a plurality is established or there is just one actor, the corporation, operating through multiple agents. These questions have plagued antitrust law for some time, and more recently have arisen in civil rights law.

The issue of what constitutes the requisite plurality also has arisen under general criminal conspiracy laws. The law in this area is uncertain. Courts have had trouble framing the issues correctly and have relied on inappropriate precedents in making their decisions. At times, courts also have avoided confronting the issue directly, or simply have failed to analyze the question carefully. The result has been confusion regarding what constitutes a plurality in an intracorporate situation for the purpose of criminal conspiracy laws.

This Article examines the law on the plurality required for conspiracy under the criminal law in the two intracorporate fact patterns

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1. Throughout this Article, the term "agent" is used as it is defined in the Model Penal Code. See MODEL PENAL CODE § 2.07(4)(b) (Proposed Official Draft 1962): "[A]gent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association"

outlined above, and examines the differences between the plurality required for civil rights and antitrust conspiracies on the one hand and criminal conspiracies on the other. The Article begins with a brief history of conspiracy and an introduction to its roles in various areas of law. The plurality component of conspiracy is then examined in detail in two areas, antitrust and civil rights, to determine how plurality is defined in those areas and the rationale behind the definition.

After a brief discussion of corporate criminal liability and criminal conspiracy generally, the plurality requirement for criminal conspiracy is examined in detail. The Article concludes by proposing an analysis for the definition of corporate criminal conspiracy based on the substantive goals of criminal conspiracy law. Under this analysis, the plurality requirement is not met when a corporation and only a single agent are involved. When two or more agents of a corporation conspire, however, liability is not precluded. In this second situation, the question is whether agents of the same corporation can constitute a plurality. If they can, the liability of the corporation for the actions of its agents should be determined under the usual standards of corporate criminal liability.

The question whether multiple agents of a single corporation can constitute a plurality has been answered differently by the courts in different contexts. In antitrust and civil rights cases, courts have generally held that multiple agents are not a plurality. This Article concludes that such decisions reflect policy considerations unique to these areas of law, and that their reasoning is not apposite to criminal conspiracy. In the general criminal conspiracy context, the best approach is to analyze plurality with reference to the underlying purposes of criminal conspiracy law. The Article concludes that a rule that finds the requisite plurality in multiple agents of a single corporation will best further those purposes.

A Historical Overview of Conspiracy

The crime of conspiracy originated in a series of statutes passed in the late thirteenth and early fourteenth centuries.² The statutes were designed to eliminate a narrowly defined problem: combinations of conspirators that maintained vexatious suits or procured improper indictments or appeals.³ The first significant expansion of the scope of

2. See generally Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 394-409 (1922) [hereinafter cited as Sayre]; *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922-23 (1959) [hereinafter cited as *Developments—Criminal Conspiracy*].

3. Sayre, *supra* note 2, at 396.

conspiracy occurred in the early seventeenth century when the Court of Star Chamber held that "confederating together constituted the gist of the offense."⁴ This shift in focus from the specific object of the conspiracy to the conspiracy itself resulted in a less certain definition of the necessary objective, which under the specific statutes was limited to confederations for the purpose of defeating the just administration of the law.⁵

Another important expansion of the law of conspiracy occurred during the seventeenth century: the definition of conspiracy was stretched to include combinations that had as their object any crime, not only those that endeavored to obstruct the administration of justice.⁶ Finally, during the early eighteenth century, the concept grew to include conspiracies aimed at noncriminal acts; conspiracy could be based on an agreement either to do an unlawful act or to do a lawful act by unlawful means.⁷ This extremely broad definition of conspiracy is still used by modern courts.⁸

Today, the concept of conspiracy is important in at least three distinct substantive areas of law: federal antitrust law, federal civil rights law, and criminal law.⁹ Under the Sherman Act, both civil and criminal liability may be imposed for certain prohibited types of conspiracies.¹⁰ Section 1985(3) of the Civil Rights Act of 1871 establishes civil sanctions for conspiracies by providing a cause of action for persons injured by certain types of conspiracies.¹¹ Finally, under criminal laws,

4. *Id.* at 398, referring to the *Poulterers' Case*, 9 Coke 55b (1611).

5. *Id.* at 398-400. Professor Sayre characterizes the *Poulterers' Case* as "the first step in the long process by which the early rigidly defined crime of conspiracy was, through judicial, analogical extension, gradually expanded into the vague and uncertain doctrine which we know to-day." *Id.* at 398.

6. *Id.* at 400.

7. *Id.* at 402-06. Professor Sayre concludes that this extension did not originate in the case law, but resulted instead from an ambiguous and unwarranted statement by Hawkins in his *Pleas of the Crown* (1716). *Id.* at 402.

8. *Arlinghaus v. Ritenour*, 622 F.2d 629 (2d Cir.), *cert. denied*, 449 U.S. 1013 (1980) (civil conspiracy); *Rotermund v. United States Steel Corp.*, 474 F.2d 1139, 1145 (8th Cir. 1973) (civil conspiracy); *cf.* *United States v. DeLoache*, 279 F. Supp. 720, 729 (W.D. Mo. 1968) (criminal conspiracy).

9. Conspiracy is also a common law tort doctrine. *See, e.g.*, *Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971) (conspiracy to hinder business); *May v. Santa Fe Trail Transp. Co.*, 189 Kan. 419, 380 P.2d 390 (1962) (alleged conspiracy to cause discharge from employment). For a discussion of how tort principles have been applied in corporate conspiracy cases, see note 112 *infra*.

10. 15 U.S.C. §§ 1, 2 (1976).

11. Civil Rights Act of 1871, ch. 22, § 2, 42 U.S.C. § 1985(3) (Supp. III 1979) (formerly § 1985(c)).

various conspiracies are prohibited as crimes.¹² The statutes establishing these conspiracy actions are similar in that they are all relatively skeletal; therefore, much of the responsibility for defining conspiracy has fallen to the courts, and conspiracy must be examined primarily through case law.

Plurality Under the Antitrust Laws

Conspiracy is prohibited by two antitrust statutes.¹³ Section 1 of the Sherman Act prohibits conspiracies in restraint of trade,¹⁴ and section 2 of the Sherman Act prohibits conspiracies to monopolize trade.¹⁵ In contrast to other antitrust statutes, which permit unilateral violations and so pose no question of plurality,¹⁶ these conspiracy provisions of the Sherman Act require a plurality of actors to establish a violation.¹⁷

Conspiracy Between a Single Agent and the Corporation

A person's conduct, even if clearly in restraint of trade, cannot be reached by section 1 of the Sherman Act if there is no contract, combination, or conspiracy.¹⁸ When a single agent of a corporation has acted alone to restrain trade, the plaintiff sometimes has sought to bring the

12. See, e.g., 18 U.S.C. § 371 (1976).

13. For the purpose of discussing the plurality requirement of conspiracies under the Sherman Act, there is no difference between civil antitrust actions and criminal antitrust actions. No distinction is made in this Article. See *United States v. American Precision Prods. Corp.*, 115 F. Supp. 823 (D.N.J. 1953) (elements of civil and criminal conspiracies under Sherman Act are the same).

For a general discussion of criminal antitrust conspiracies, see *Developments—Criminal Conspiracy*, *supra* note 2, at 1000-08 (1959).

14. 15 U.S.C. § 1 (1976).

15. *Id.* § 2. Section 2 also prohibits monopolization and attempts to monopolize. Violation of these provisions of § 2 requires no plurality and may be committed by one person. *United States v. MacAndrews & Forbes Co.*, 149 F. 823, 836 (S.D.N.Y. 1906), *appeal dismissed*, 212 U.S. 585 (1908).

16. See, e.g., Clayton Anti-Trust Act, 15 U.S.C. §§ 12-27 (1976).

17. See, e.g., *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 625 (9th Cir. 1977) (antitrust conspiracy requires plurality of actors concerting their efforts towards a common goal); *Johnny Maddox Motor Co. v. Ford Motor Co.*, 202 F. Supp. 103, 105 (W.D. Tex. 1960) (conspiracy or combination, whether to restrain trade or create a monopoly, requires at least two parties); *Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co.*, 202 F. Supp. 514, 516 (E.D. Mo. 1959) (same).

18. *Scranton Constr. Co. v. Litton Indus. Leasing Corp.*, 494 F.2d 778, 782 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (proof of combination or conspiracy essential under § 1 of Sherman Act and conspiracy portion of § 2); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966) (§ 1 of Sherman Act requires joint action and agreement between two or more parties); ATT'Y GEN., REPORT OF THE NATIONAL COMMITTEE TO STUDY ANTITRUST LAWS 31 (1955) ("Restraining trade is not illegal, but only contracting, combining and conspiring in restraint of trade.").

defendant's conduct within section 1 of the Act by alleging a conspiracy between the individual agent and his or her corporation.¹⁹ The courts uniformly have rejected the argument that an individual's actions within the scope of employment constitute a conspiracy between the individual and the employer-corporation.

The leading case involving an alleged conspiracy between an individual and a corporation is *Union Pacific Coal Co. v. United States*.²⁰ In that case, the government charged that the defendants combined to restrain trade by refusing to deal with various parties. The five defendants, the Union Pacific Coal Company; its employee and general agent, Moore; two railroad companies; and their superintendent, Buckingham, were convicted. On appeal, the Eighth Circuit found that there was insufficient evidence that the two railroad companies and Buckingham had combined with Moore and the coal company in a refusal to deal, and reversed the convictions of the railroad companies and Buckingham.

The government argued that Moore and the coal company had combined with each other to restrain trade. Rejecting this contention, the court noted that the evidence showed that no one from the company besides Moore was involved in the refusal to deal. The court concluded that one person alone could not form a combination just because he or she had acted on behalf of the corporation; there must be two or more minds involved.²¹

Cases subsequent to *Union Pacific* have reached the same result, but without such clear analysis. In *Goldlawr, Inc. v. Shubert*,²² the defendants filed a third party complaint alleging that the third party defendants, William Goldman Theatres, Inc. and its president and sole shareholder, William Goldman, conspired to control the theater business in Philadelphia in violation of sections 1 and 2 of the Sherman Act. The district court dismissed the third party complaint on the ground that a corporation could not conspire with its own agent. The

19. See, e.g., *Goldlawr, Inc. v. Shubert*, 276 F.2d 614 (3d Cir. 1960). For a discussion of *Goldlawr*, see text accompanying notes 22-24 *infra*.

No comparable arguments are necessary under § 2, because a defendant acting unilaterally may be liable for monopolization or attempted monopolization. See note 15 *supra*.

20. 173 F. 737 (8th Cir. 1909).

21. *Id.* at 745: "[A] corporation can act only by an agent, and every time an agent commits an offense within the scope of his authority under [the government's] theory the corporation necessarily combines with him to commit it. This cannot be, and it is not, the law. The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone."

22. 276 F.2d 614 (3d Cir. 1960).

third party plaintiffs appealed, arguing that, as Goldman was the sole shareholder of William Goldman Theatres, Inc., the relationship was analogous to a parent-subsidary relationship, and the plurality for conspiracy existed.²³

On appeal, the Third Circuit distinguished the parent-subsidary cases as involving "separate corporate conspirators."²⁴ The court stated that, in contrast, the facts of *Goldlawr* indicated that there was only one party, William Goldman Theatres, Inc., acting through its proper agent, Goldman. Therefore, the conspiracy claim failed for lack of a plurality, and the dismissal of the third party complaint was affirmed.

The court's analysis of the plurality question is brief and unenlightening. The court did not explain whether any person apart from William Goldman was involved in the alleged violation. The court's language and holding imply that no one else was involved. If no one else was involved, however, the court's use of precedents seems flawed. The court relied on *Nelson Radio & Supply Co. v. Motorola, Inc.*,²⁵ a leading case involving multiple employees of one company, rather than on *Union Pacific Coal Co. v. United States*.²⁶ Nevertheless, the court reached the same conclusion as that of *Union Pacific*: one agent and his or her corporation do not constitute a plurality.

In *Solomon v. Houston Corrugated Box Co.*,²⁷ the plaintiff sued under sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act,²⁸ alleging that the defendants had conspired to refuse him access to used corrugated boxes. The five defendants initially included were Houston Corrugated Box Company (HCB), the plaintiff's competitor in buying used boxes; Joe Levy, an officer of HCB; and three companies that sold used boxes: Frito-Lay, Inc., Oak Farms Dairies, and the Coca-Cola Company. Subsequently, the plaintiff voluntarily dismissed Oak Farms Dairies and the Coca-Cola Company. As to the remaining three defendants, the essence of the plaintiff's complaint was that Frito-Lay had conspired with HCB and its agent, Joe Levy, to sell its boxes to HCB instead of to the plaintiff. Granting summary judgment for the three defendants, the district court concluded that there was no evi-

23. The plaintiffs cited three cases for the proposition that a conspiracy could exist between a parent corporation and its subsidiary. *Id.* at 617 n.4.

24. *Id.* at 617.

25. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). For a discussion of *Nelson Radio*, see notes 36-38 & accompanying text *infra*.

26. 173 F. 737 (8th Cir. 1909); see notes 20-21 & accompanying text *supra*.

27. 526 F.2d 389 (5th Cir. 1976).

28. 15 U.S.C. §§ 12-26 (1976).

dence of an agreement or conspiracy in restraint of trade among the three defendants.

On appeal, the Fifth Circuit observed that "[i]t is well-settled that the Sherman Act's conspiracy or agreement requirement is not met by a 'conspiracy' between a corporation and its corporate officer"²⁹

As in *Union Pacific*, the plurality question in *Solomon* arose because some defendants were eliminated as conspirators by a lack of evidence.³⁰ Once these defendants were disqualified as conspirators, the conspiracy had to exist, if at all, between the individual defendant and the company he represented. Like *Goldlawr*,³¹ the *Solomon* opinion is unclear. The court does not mention any HCB employees other than Joe Levy. If no one else was involved, the court's reliance on *Nelson Radio*, which involved multiple employees, rather than on *Union Pacific*, was misleading.

The cases, however, are uniform in holding that an individual employee who restrains trade while acting as a corporate agent is not liable for conspiracy under the antitrust laws. To supply the requisite plurality for a conspiracy, there must be the conscious participation of two or more minds. One reason for this rule is that, if plurality were held to be established by one individual acting on behalf of a corporation, conspiracy liability would then be automatic: every time a corporate agent acted within the scope of employment, he or she would necessarily conspire with the corporation.³²

Conspiracy Among Several Agents of a Single Corporation

A different question is presented when the alleged antitrust conspiracy involves several agents of a single company. In this situation, the requirement of the conscious participation of two minds is met. The Supreme Court has avoided the question whether the employees of

29. 526 F.2d at 396. Thus, no conspiracy could be based on the relationship between HCB and Levy, and the illegal agreement had to exist, if at all, between Frito-Lay and either HCB or Joe Levy. The court found that Frito-Lay had ceased doing business with the plaintiff for individually motivated reasons and not because of an agreement with anyone. Therefore, the court held, all defendants were eliminated as possible conspirators and the summary judgment in favor of defendants was proper.

30. *Id.*

31. *Goldlawr, Inc. v. Shubert*, 276 F.2d 614 (3d Cir. 1960). See notes 22-24 & accompanying text *supra*.

32. Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158, 180 (1962) (if there is only one active participant, "regardless of whether the action is brought against the corporation, the officer . . . or both, the only possible result upon grounds of both logic and precedent, is that a violation of the conspiracy portions of the Sherman Act can not exist") [hereinafter cited as Barndt].

one corporation establish the plurality required for conspiracy under the antitrust laws.³³ The result has been a split of authority among the circuits.³⁴

Under the majority rule, employees of the same company³⁵ cannot supply the plurality necessary to establish conspiracy.³⁵ The leading case articulating this position is *Nelson Radio & Supply Co. v. Motorola, Inc.*³⁶ The plaintiff was a wholesale distributor of electric appliances supplied by Motorola. When Motorola insisted on new terms for the plaintiff's franchise, the plaintiff refused and Motorola subsequently declined to renew the plaintiff's distributorship contract.

The plaintiff alleged a conspiracy between Motorola and its president, its sales manager, and other employees and agents in violation of section 1 of the Sherman Act. The district court dismissed the complaint for failure to state a claim. The Fifth Circuit affirmed on the basis that the required plurality did not exist.

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.³⁷

The court's analysis in *Nelson Radio* is confusing. First, although it may be characterized as "basic" that conspiracy requires two persons in the sense of two minds, it is not basic to all forms of conspiracy that two entities or two persons, in the sense of two business associations, be involved. If the court meant that two entities are basic to conspiracy *under the antitrust laws*, to avoid confusion it should have stated this

33. In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the government filed a civil action against five defendants, alleging a conspiracy in restraint of trade under § 1 of the Sherman Act, a conspiracy to monopolize under § 2, and an attempt to monopolize under § 2. The five defendants were the Lorain Journal Company and four of its executive officers. Holding that the defendants had attempted to monopolize, the district court entered an injunction against them. On appeal, the Supreme Court affirmed the district court and confined itself exclusively to a discussion of whether the defendants' conduct constituted an attempt to monopolize.

Cf. Developments—Criminal Conspiracy, *supra* note 2, at 1000 ("The Court's language suggests that there can be a conspiracy among the directors of a corporation acting in their official capacity.") (footnote omitted); *see also id.* at 1000 n.614.

34. L. SULLIVAN, ANTITRUST § 114, at 324 (1977) (stating that "the directly relevant case law is sharply split"). Compare *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (no plurality established by agents of single corporation under § 1 of Sherman Act) with *Patterson v. United States*, 222 F. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915) (plurality established by officers and agents of single corporation under § 1 of Sherman Act).

35. See cases cited in note 77 *infra*.

36. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

37. *Id.* at 914.

explicitly.³⁸

Second, the *Nelson Radio* court stated that a corporation cannot conspire "with" itself. A more pertinent question is whether the corporation can be held as a conspirator for the acts of more than one of its agents. Although in effect, the Fifth Circuit answered this question in the negative, the court's framing of the issue predestined the result.

The position taken by the Fifth Circuit in *Nelson Radio* has been adopted by other courts.³⁹ For example, the Eighth Circuit, in *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*,⁴⁰ held that multiple employees of a single company cannot constitute the plurality necessary for a Sherman Act conspiracy. The plaintiff was a distributor of prefabricated buildings manufactured by the defendant, Morton Buildings. When Morton Buildings terminated the plaintiff's distributorship contract, the plaintiff sued Morton Buildings and several individual employees of Morton Buildings, alleging a conspiracy in violation of section 1 of the Sherman Act. The district court entered judgment for the defendants. On appeal, the court noted that it was difficult to identify the plaintiff's theory of conspiracy, but held that, "[t]o the extent that [the plaintiff] bases his theory on a conspiracy between Morton and the individual defendants, the action cannot be maintained."⁴¹ The theory of conspiracy failed because of the lack of a plurality.

Many courts have echoed this majority position.⁴² The rationale for the rule, however, is unclear. The court in *Nelson Radio* based its

38. Confusion has resulted regarding both civil rights conspiracies and criminal conspiracies. See, e.g., *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1257 n.117 (3d Cir. 1978), *vacated and remanded on other grounds*, 442 U.S. 366 (1979) (civil rights) (characterizing *Nelson Radio* as the "fountainhead of the precept" that a corporation cannot conspire with its officers); *United States v. Allied Chem. Corp.*, No. 76-0129, slip op. at 2 (E.D. Va. July 6, 1976) (criminal) (citing *Nelson Radio*); see also Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 HARV. L. REV. 470, 479-82 (1978) (*Nelson Radio* is "main precedent" relied on in civil rights cases) [hereinafter cited as *Intracorporate Conspiracies*].

39. See, e.g., *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n.9 (9th Cir. 1969) ("A corporation cannot conspire with its officers or agents to violate the antitrust laws."); *Gordon v. Illinois Bell Tel. Co.*, 330 F.2d 103 (7th Cir.), *cert. denied*, 379 U.S. 909 (1964) (because individual defendants acted only on behalf of corporate defendant and not on their own behalf, there was no conspiracy as required under § 1 of Sherman Act).

40. 531 F.2d 910 (8th Cir. 1976).

41. *Id.* at 916.

42. See, e.g., *Card v. National Life Ins. Co.*, 603 F.2d 828 (10th Cir. 1979); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Ray v. United Family Life Ins. Co.*, 430 F. Supp. 1353 (W.D.N.C. 1977); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237 (D.N.J. 1976); *Goldinger v. Boron Oil Co.*, 375 F. Supp. 400 (W.D. Pa. 1974), *aff'd*, 511 F.2d 1393 (1975); *South End Oil Co. v. Texaco*, 237 F. Supp. 650 (N.D. Ill. 1965); *Marion County Co-op. Ass'n v. Carnation Co.*, 114 F. Supp. 58 (W.D. Ark.

justification of the rule primarily on the requirements of conspiracy doctrine rather than on antitrust law.⁴³ This approach is confusing, because conspiracy has different requirements in different substantive contexts. Later decisions adopting *Nelson Radio* have been no more enlightening.⁴⁴

The most convincing explanation for the majority rule was offered in 1955 by the Attorney General's Committee to Study the Antitrust Laws:

Restraining trade is not illegal, but only contracting, combining, and conspiring in restraint of trade. Since a corporation can only act through its officers, and since the normal commercial conduct of a single trader acting alone may restrain trade, many activities of any business could be interdicted were joint action solely by agents of a single corporation acting on its behalf held to constitute a conspiracy in restraint of trade.⁴⁵

As the Attorney General's report makes clear, the rule is based not on conspiracy law but on antitrust policy. If the employees of a single company were held to establish the requisite plurality for conspiracy, companies and their employees regularly would violate the antitrust laws, and most business activity would be illegal.⁴⁶ The majority rule is also justified because conspiracy within a single corporation does not

1953), *aff'd*, 214 F.2d 557 (1954); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1937).

Although the Third Circuit cited with approval and relied on *Nelson Radio* in *Goldlawr, Inc. v. Shubert*, 276 F.2d 614 (3d Cir. 1960), discussed in text accompanying notes 22-24 *supra*, it has more recently suggested its disapproval of *Nelson Radio*. See *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1257 n.117 (3d Cir. 1978), *vacated and remanded on other grounds*, 442 U.S. 366 (1979); *Johnston v. Baker*, 445 F.2d 424, 427 (3d Cir. 1971).

43. 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). See note 37 & accompanying text *supra*.

44. Most courts that have adopted the rule of no plurality merely restate the rule and then cite *Nelson Radio*. *Id.* See, e.g., *Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910, 916-17 & n.8 (8th Cir. 1976); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n.9 (9th Cir. 1969); *Gordon v. Illinois Bell Tel. Co.*, 330 F.2d 103, 107 (7th Cir.), *cert. denied*, 379 U.S. 909 (1964). The courts that attempt to offer an explanation for the rule offer only the most cursory explanation. See, e.g., *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978).

45. ATT'Y GEN., REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 31 (1955).

46. For example, a decision by the board of directors on the price to charge for a product technically might qualify as a price fixing conspiracy. This potential for overbroad antitrust liability is precluded by the restrictive definition of plurality. ATT'Y GEN., REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 31 (1955); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5, 8 (1963) [hereinafter cited as Stengel]. See *Ray v. United Family Life Ins. Co.*, 430 F. Supp. 1353, 1358 (W.D.N.C. 1977).

raise any of the anticompetitive concerns that the antitrust laws were designed to eliminate.⁴⁷

A minority of jurisdictions concluded that several employees of a single company can constitute a sufficient plurality for liability under antitrust conspiracy laws. In the leading case adopting this view, *Patterson v. United States*,⁴⁸ the Sixth Circuit sustained the convictions of the defendants, twenty-eight officers and agents of a cash register company, for antitrust violations. The defendants had gained control over ninety-five percent of the cash register market through various coercive practices. The court held that the defendants' conduct violated both sections 1 and 2 of the Sherman Act.

[Section 2] includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor. But it is not limited to such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person Clearly, then, a conspiracy between the officers and agents of one competitor on its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it.⁴⁹

Another case implicitly finding a sufficient plurality in an intracorporate conspiracy is *White Bear Theatre Corp. v. State Theater Corp.*⁵⁰ The Eighth Circuit sustained the conviction of a corporation that exhibited motion pictures, holding that the corporation and its officers had conspired in violation of section 2 of the Sherman Act.

Patterson and *White Bear* are the only reported cases that have held or implied that the employees of a single company can compose the plurality of parties contemplated by the antitrust conspiracy laws. These cases, however, are not persuasive. In *Patterson*, no argument was made against intracorporate plurality; thus, the court did not consider this preliminary question.⁵¹ Furthermore, as the corporation was not a defendant, no question of corporate liability arose. In *White Bear*, the court's specific holding is obscured because the court discussed attempt to monopolize along with conspiracy to monopolize.⁵²

47. See *Ray v. United States Family Life Ins. Co.*, 430 F. Supp. 1353, 1358 (W.D.N.C. 1977). See generally *Developments—Criminal Conspiracy*, *supra* note 2, at 1001-02 (recounting justifications for the rule of no plurality).

48. 222 F. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915).

49. *Id.* at 618-19.

50. 129 F.2d 600 (8th Cir. 1942).

51. See *Bardt*, *supra* note 32, at 181 (no argument made against intracorporate conspiracy and liability of corporation not considered); *Stengel*, *supra* note 46, at 6 (notwithstanding clear violation of § 2, court was "not content" and made unnecessary statements regarding conspiracy under § 1).

52. The court based its decision on § 2 of the Sherman Act, and although it did not need to reach the plaintiff's § 1 allegations, discussed and ruled on that area as well. 129

Finally, the vitality of *White Bear* is questionable in light of the Eighth Circuit's recent contrary holding in *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*⁵³

Despite the controversy among commentators regarding the status of the law,⁵⁴ and the split in the cases,⁵⁵ the majority position is that employees of a single company cannot constitute the plurality of parties required for a conspiracy under the antitrust laws.⁵⁶ Although infrequently articulated, the best rationale for this position is that, if agents of a single company were held to establish plurality, the agents and corporation would often violate the antitrust laws when making routine business decisions. The definition of plurality for antitrust conspiracies is based on policies of substantive antitrust law, policies that are not involved in general conspiracy law.

The soundness of the majority position is controversial.⁵⁷ While the rule has been endorsed because an alternative may lead to unlim-

F.2d at 602 n.3. The court stated that a monopoly under § 2 is a type of restraint of trade under § 1. *Id.* This comment by the court has led to controversy. Some commentators have interpreted *White Bear* as holding that plurality for § 1 is established by an intracorporate conspiracy. See ATT'Y GEN., REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 31 (1955) ("[P]laintiffs in both cases [*Patterson* and *White Bear*] charged violations of Section 2, thus making unnecessary to the result the brief of discussion of the applicability of Section 1 . . ."); Note, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372, 386 (1954) (§ 1 violation sustained in *White Bear*). In contrast, other commentators argue that *White Bear* did not reach the question of a conspiracy under § 1. See Barndt, *supra* note 32, at 181 (§ 1 conspiracy not considered in *White Bear*); Stengel, *supra* note 46, at 7 (*White Bear* is no authority for § 1 conspiracy).

53. 531 F.2d 810 (8th Cir. 1976). See text accompanying notes 40-41 *supra*.

54. See, e.g., L. SULLIVAN, ANTITRUST § 114, at 324 (1977) (directly relevant case law sharply split); Barndt, *supra* note 32, at 182-85 (cases are not uniform and indicate that intracorporate conspiracy is possible); Stengel, *supra* note 46, at 6-7 (*Patterson* is "high water mark" of intracorporate conspiracy and all recent decisions are in accord with *Nelson Radio*); Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c): The Impact of Novotny v. Great American Federal Savings & Loan Ass'n*, 13 GA. L. REV. 591, 614-15 (1979) ("[N]o court deciding a case under the antitrust laws has held the conspiracy element to be satisfied when the only conspirators have been officers . . . of a single corporation . . .") [hereinafter cited as *The Impact of Novotny*]; Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717, 717 (1977) ("Neither officers, directors [nor employees] . . . within a single corporation have ever been held to have conspired with either the corporation or with one another.").

55. See note 34 & accompanying text *supra*.

56. See cases cited in note 42 *supra*.

57. Compare Stengel, *supra* note 46, at 8 (agreeing with majority rule of no plurality) with Barndt, *supra* note 32, at 185-86 (criticizing majority rule of no plurality in view of contrary rule under general criminal law) and Note, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372, 386-87 (1954) (criticizing no plurality rule as anomalous in view of contrary rule applied to multiple corporations within single enterprise).

ited liability,⁵⁸ it has been suggested that the potential of limitless liability could be avoided with more direct approaches based on the substantive antitrust law rather than on the definition of plurality.⁵⁹ Protection from limitless liability would be found either in the requirement that the defendants' conduct impose an unreasonable restraint of trade or in the requirement that the matter be more than a merely private controversy.⁶⁰ These approaches would avoid the doctrinal rigidity of the plurality rule,⁶¹ but provide protection from limitless antitrust violations.⁶²

58. See, e.g., Stengel, *supra* note 46, at 8.

59. Barndt, *supra* note 32, at 186; *Developments—Criminal Conspiracy*, *supra* note 2, at 1003-05; Note, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372, 386-88 (1954).

60. Barndt, *supra* note 32, at 186; *Developments—Criminal Conspiracy*, *supra* note 2, at 1004-05; Note, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372, 386-88 (1954). Section 1 of the Sherman Act does not prohibit all restraints of trade; only *unreasonable* restraints are prohibited. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Furthermore, the conduct must result in a restraint of trade that has an effect on interstate commerce; it may not be merely a private controversy. *Burke v. Ford*, 389 U.S. 320 (1967); *City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 526 (9th Cir.), *cert. denied*, 412 U.S. 950 (1972) ("[T]here must be some limit on the intrusiveness of Sherman Act regulation. Since every enterprise, however localized, inevitably has some effect, however remote, on the flow of commerce among the states, some 'localness,' 'remoteness,' or 'de minimis' factor must intervene or federal regulation is boundless.").

These two prerequisites for liability under § 1 of the Sherman Act would protect a corporation from limitless antitrust liability even if its agents were defined as a plurality.

61. Commentators have suggested that some uncertainty is natural in antitrust law specifically and in corporate law generally. Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 CATH. L. REV. 389, 417-18 (1980); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 427 (1963). Another commentator has suggested that uncertainty is desirable in corporate law. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 25 n.101 (1980) [hereinafter cited as Stone].

62. There is some indication that courts are moving away from the rigidity of the plurality rule and looking instead at economic realities on a case-by-case basis. In *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979), two sugar brokers sued Amstar, a large sugar refiner, for violations of §§ 1 and 2 of the Sherman Act in terminating the plaintiffs as its general sugar brokers. The trial court found that Amstar had violated § 1 for conspiring with its other general brokers to restrain trade. On appeal, Amstar argued that it was legally incapable of conspiring with its brokers because they were agents of Amstar and were "economically indistinguishable" from Amstar. *Id.* at 1030 n.4. The Second Circuit avoided this specific ground for decision, and instead held that there was insufficient evidence to support the jury finding of a conspiracy with anyone. In reaching this result, however, the court suggested that the determination of plurality is not as conclusive as it once was. "The Sherman Act does not condemn every busi-

Plurality Under the Civil Rights Laws

Plurality in conspiracy is also an issue under the federal civil rights laws. Section 1985(3)⁶³ provides a cause of action for persons injured as a result of a conspiracy to deprive them of their civil rights.⁶⁴ Section 1985(3) at one time was restricted to conspiracies under color of state law,⁶⁵ but in 1971 the Supreme Court ruled that this section also applied to private conspiracies.⁶⁶

Because of the expansion of section 1985(3) to include private conspiracies, when a plaintiff is deprived of civil rights by a corporation, he or she may have a cause of action. A plaintiff, however, still must satisfy the threshold requirement of establishing a conspiracy between "two or more persons."⁶⁷ To meet this plurality requirement in the intracorporate context, plaintiffs have alleged that a plurality is established by the individual corporate agents.⁶⁸ Although no cases have

ness decision as a § 1 conspiracy merely because it is the product of an agreement between two persons or entities legally capable of conspiring." *Id.* at 1029-30.

This approach to antitrust conspiracies based on factual analysis of the economic realities and anticompetitive effect, rather than on rigid rules of plurality, may be more common in the future. *See, e.g.,* Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 927 n.5 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981) (affiliated corporations); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-18 (9th Cir. 1979), *cert. denied*, 447 U.S. 907 (1980) (same).

63. Civil Rights Act of 1871, § 2, 42 U.S.C. § 1985(3) (Supp. III 1979) (formerly § 1985(c)).

64. The statute provides: "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3) (Supp. III 1979). The history of § 1985(3) is described in *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1238-40 (3d Cir. 1978), *vacated and remanded*, 442 U.S. 366 (1979).

65. *See, e.g.,* *Griffin v. Breckenridge*, 403 U.S. 88, 92 (1971); *Collins v. Hardyman*, 341 U.S. 651, 661 (1951).

66. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). In *Griffin*, the Court rejected its holding in *Collins v. Hardyman*, 341 U.S. 651 (1951), that § 1985(3) required state action. The Court stated that "all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." 403 U.S. at 101. The Court concluded that, because the constitutional problems perceived in *Collins* simply did not exist, the "artificially restrictive construction of *Collins*" should be abandoned. *Id.* at 96.

67. 42 U.S.C. § 1985(3) (Supp. III 1979); *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 70 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976).

68. *See, e.g.,* *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 70 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Dombrowski v. Dowling*, 459 F.2d 190, 191-92 (7th Cir. 1972); *Dupree v. Hertz Corp.*, 419 F. Supp. 764, 765-66 (E.D. Pa. 1976).

been reported in which the plaintiff alleged that one agent of a corporation acting alone established a conspiracy between the agent and the corporation,⁶⁹ it has been alleged that multiple agents of a single corporation can constitute a plurality capable of conspiracy under section 1985(3).⁷⁰

Conspiracy Among Several Agents of a Single Corporation

Courts have reached different conclusions on the question whether multiple agents of a single corporation constitute a plurality.⁷¹ The vast majority of courts have held that agents of a single corporation cannot constitute the plurality of persons necessary for conspiracy under the federal civil rights laws.⁷² The leading case espousing this view is *Dombrowski v. Dowling*.⁷³ In *Dombrowski*, the plaintiff was a criminal law attorney who sued a real estate corporation and two of its agents under section 1985(3), claiming that the defendants had conspired to refuse to rent him office space because many of his clients were black or Latin. The district court entered summary judgment in favor of the plaintiff.⁷⁴ On appeal, the Seventh Circuit dismissed the section 1985(3) claim, holding that the plurality element was not established. The statutory requirement of "two or more persons" was

not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm. We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. . . . But if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the

69. Cases involving an alleged conspiracy between an agent and a corporation based solely on the actions of the agent have arisen under the antitrust laws, see text accompanying notes 18-32 *supra*, and under the general criminal law, see text accompanying notes 158-80 *infra*.

70. See generally *The Impact of Novotny*, *supra* note 54; *Intracorporate Conspiracies*, *supra* note 38.

71. Compare *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1262 (3d Cir. 1978), *vacated and remanded on other grounds*, 442 U.S. 366 (1979) (multiple agents of a single corporation establish plurality) with *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (multiple agents of a single corporation do not establish plurality).

Several courts have noted the split of authority on the definition of plurality under the civil rights laws. See *Weise v. Syracuse Univ.*, 522 F.2d 397, 408-09 n.16 (2d Cir. 1975); *Hodgin v. Jefferson*, 447 F. Supp. 804, 807 (D. Md. 1978); *Cap v. Lehigh Univ.*, 433 F. Supp. 1275, 1282 n.5 (E.D. Pa. 1977).

72. See cases discussed in text accompanying notes 73-77 *infra* and cases cited in note 77 *infra*. See generally *The Impact of Novotny*, *supra* note 54, at 605 n.57; *Intracorporate Conspiracies*, *supra* note 38, at 471.

73. 459 F.2d 190 (7th Cir. 1972). This case was decided under the pre-1980 codification of the statute at 42 U.S.C. § 1985(c) (1976).

74. 459 F.2d at 191-92.

decision or in the act itself will normally not constitute the conspiracy contemplated by this statute.⁷⁵

The Seventh Circuit's holding in *Dombrowski* has been followed in other circuits.⁷⁶ Although many courts have adopted the *Dombrowski* rule,⁷⁷ the rationale of these cases is unclear. The Seventh Circuit's explanation that *Dombrowski* involved essentially a single act by a single business entity means little. The court did not explain why the participation of several individuals should be ignored and their conduct characterized as a single act by a single entity. Most courts adopting the *Dombrowski* position merely quote that decision without offering any further explanation or justification.⁷⁸ The courts do not reveal what goals or policies of section 1985(3)⁷⁹ are served by defining plurality to confer immunity on individuals working for a single corporation who would otherwise be liable under the civil rights law.⁸⁰ The best explanation for the rule⁸¹ is judicial concern that section 1985(3) needs

75. *Id.* at 196.

76. In *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976), the plaintiff sued a corporation and the individual officers and directors of the corporation. The plaintiff alleged that the defendants conspired to deprive her of her civil rights, in violation of § 1985(3), by refusing to place stock in the corporation in her name because of her sex. The district court dismissed the plaintiff's § 1985(3) claim because there was no conspiracy; the individual defendants were merely carrying out the corporation's policy. *Id.* at 67-68. Relying on *Dombrowski*, the Second Circuit affirmed the district court decision. *Id.* at 70-72. As there was no allegation that the individual defendants acted in other than their official capacities, the situation involved only the implementation of a single policy by a single corporation. Thus, the defendants were "safely within the area of the *Dombrowski* decision . . ." *Id.* at 71; *accord* *Herrmann v. Moore*, 576 F.2d 453 (2d Cir. 1978).

Similarly, the Eighth Circuit has relied on *Dombrowski* to hold that agents of a single corporation do not constitute a plurality capable of conspiracy under § 1985(3). *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974).

77. See, e.g., *Schroeder v. Dayton-Hudson Corp.*, 448 F. Supp. 910, 915 (E.D. Mich. 1977); *Johnson v. University of Pitt.*, 435 F. Supp. 1328, 1370 (W.D. Pa. 1977); *Rubenstein v. Univ. of Wis. Bd. of Regents*, 422 F. Supp. 61, 64 (E.D. Wis. 1976); *Keddie v. Pennsylvania State Univ.*, 412 F. Supp. 1264, 1276 (M.D. Pa. 1976); *Milburn v. Blackafrica Promotions, Inc.*, 392 F. Supp. 434, 436 (S.D.N.Y. 1974); *Fallis v. Dunbar*, 386 F. Supp. 1117, 1121 (N.D. Ohio 1974).

78. See, e.g., *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 70 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Baker v. Stuart Broadcasting Corp.*, 505 F.2d 181, 183 (8th Cir. 1974). See text accompanying notes 76-77 *supra*.

79. Section 1985(3) serves essentially three purposes: compensation, deterrence, and punishment. See *Intracorporate Conspiracies*, *supra* note 38, at 486-87.

80. Individuals who conspire would be liable under § 1985(3) unless they worked for the same company, which would make them immune under *Dombrowski*. In the context of government bureaucracies, there is no comparable rule of no plurality. See, e.g., *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

81. Although the courts have not explained why they adopted the rule prohibiting intracorporate plurality, it has been suggested that the rule may have resulted from qualms

some limiting principle to preclude it from becoming a general federal tort law.⁸²

Courts often have found the majority rule unacceptable, and have created exceptions based on the equivocal language of *Dombrowski*.⁸³ First, based on the Seventh Circuit's reference to a "single act of discrimination,"⁸⁴ some courts have found that *Dombrowski* is inapplicable when there are "many continuing instances of discrimination," rather than a single act.⁸⁵ Second, based on the Seventh Circuit's reference to a "single business entity,"⁸⁶ it has been held that *Dombrowski* does not apply when the individuals, although acting for the same corporation, represent distinct decisionmaking units within the corporation.⁸⁷ Third, based on the Seventh Circuit's emphasis on the fact that the *Dombrowski* defendants all acted within the scope of their authority,⁸⁸ some courts have stated that plurality is established if any of the corporate agents acted outside the scope of his or her authority.⁸⁹

regarding the constitutionality of applying § 1985(3) to private conspiracies, see *Intracorporate Conspiracies*, *supra* note 38, at 485-86 n.90, or from the unthinking application of rules of plurality developed in the context of antitrust laws to the field of civil rights. *Id.* at 479.

These suggestions are not convincing. The constitutionality of the application of § 1985(3) was settled by the United States Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), and suggestions of continuing fears seem far-fetched. The suggestion that the circuit courts are applying antitrust precedents unthinkingly to civil rights cases gives far less credit to the courts than they deserve. Thus, the only truly plausible explanation for the *Dombrowski* rule would seem to be judicial concern over expansion of the scope of § 1985(3).

82. See *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971); *McClellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 940 (5th Cir. 1977) (Godbold, J., dissenting). See generally Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 GEO. WASH. L. REV. 239, 251-52 (1977); *Intracorporate Conspiracies*, *supra* note 38, at 484-85.

83. See text accompanying note 75 *supra*.

84. *Dombrowski*, 459 F.2d at 196.

85. *Rackin v. University of Pa.*, 386 F. Supp. 992, 1005 (E.D. Pa. 1974); see also *Aungst v. J.C. Penney Co.*, 456 F. Supp. 370 (W.D. Pa. 1978).

86. *Dombrowski*, 459 F.2d at 196.

87. *Beamon v. W.B. Saunders Co.*, 413 F. Supp. 1167, 1176-77 (E.D. Pa. 1976).

88. *Dombrowski*, 459 F.2d at 193 ("Since . . . [both individuals] acted within the scope of their authority as agents for that firm, it is open to question whether the conspiracy requirement of § 1985(3) has been met.").

89. This exception was first implied in *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 71-72 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976), and then explicitly adopted in *Hodgin v. Jefferson*, 447 F. Supp. 804, 807 (D. Md. 1978) (unauthorized acts of officials do not constitute corporate action and hence cannot avoid a conspiracy charge); see also *Cole v. University of Hartford*, 391 F. Supp. 888, 892-93 (D. Conn. 1975).

This exception has created a dilemma. If all agents act within the scope of their authority, there is no plurality and the corporation is not liable. On the other hand, if all agents exceed the scope of their authority, the doctrine of respondeat superior provides that the corporation is not responsible for the agents' acts. Thus, if all the agents stick together and act either exclusively within or exclusively outside their scope of authority, the corporation is

As the exceptions to *Dombrowski* indicate, the courts are willing to find that the plurality of persons required for conspiracy under section 1985(3) exists in an intracorporate context. Moreover, in a recent decision, the Third Circuit reinterpreted the plurality requirement of section 1985(3). Instead of invoking *Dombrowski* or an exception to it, the Third Circuit abandoned *Dombrowski* altogether in *Novotny v. Great American Federal Savings & Loan Association*⁹⁰ and concluded that agents of a single corporation can compose the plurality required for a civil rights conspiracy.⁹¹

In *Novotny*, the plaintiff sued his former employer, Great American Federal Savings & Loan Association, and nine individual officers and directors of the corporation. The plaintiff contended that the defendants were liable under section 1985(3) because they had fired him after he had defended a female employee who alleged that the corporation discriminated against her because of her sex. The district court dismissed the section 1985(3) claim on the basis that the defendants had committed only a single act of "business entity" discrimination against the plaintiff, and this was insufficient to establish a claim under section 1985(3).⁹² The court relied on *Dombrowski* for the proposition that, if only a single act of discrimination by a single entity is involved, the fact that two or more agents participated will not create a conspiracy under section 1985(3).⁹³

immune. See generally *The Impact of Novotny*, *supra* note 54, at 609 n.81; *Intracorporate Conspiracies*, *supra* note 38, at 475.

The Seventh Circuit, explaining its rationale in *Dombrowski*, stated that agents acting within their scope of authority could not always avoid a conspiracy finding and gave this example: "Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon." *Dombrowski*, 459 F.2d at 196. A potential fourth exception, based on this language, providing that the *Dombrowski* rule would not apply to racially motivated acts of violence, never has been accepted by any court and has been specifically rejected by one. *Cole v. University of Hartford*, 391 F. Supp. 888, 893 (D. Conn. 1975) (involving discriminatory practices, not violence). Nevertheless, if the Seventh Circuit's reference to the Klan has any meaning, it might be interpreted to create an exception for racially motivated acts of violence.

As it is unlikely that a corporate agent who commits a racially motivated act of violence also acts within the scope of his or her employment to further a corporation's legitimate purpose, a corporate agent falling under the exception for racially motivated acts of violence probably would also fall under the exception of acting beyond the scope of his or her authority. Plurality could be established on the latter basis.

90. 584 F.2d 1235 (3d Cir. 1978) (en banc), *vacated and remanded on other grounds*, 442 U.S. 366 (1979).

91. *Id.* at 1257-59.

92. 430 F. Supp. 227, 230 (W.D. Pa. 1977).

93. *Id.* at 229-30. The plaintiff attempted to rely on *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974), which held that continuing instances of discrimination and harassment constituted more than a single act of discrimination by a single business entity, thus

Reversing the district court, the Third Circuit held that the officers of a single corporation did establish the plurality required for conspiracy under section 1985(3). The court began by noting that section 1985(3) on its face requires only that "two or more persons" conspire in order for the statute to apply.⁹⁴ The court noted that there was no basis in the legislative history of section 1985(3) for the argument that multiple employees of a company do not constitute a plurality. The court framed the issue not as whether a corporation can conspire with itself, but whether the individual officers and employees of a corporation are capable of conspiring within the meaning of section 1985(3).

The court found that the argument that employees of a single corporation do not constitute a plurality conflicts with the "general tenets of conspiracy theory."⁹⁵ Analogizing the situation to the "well-established line of precedent" finding a plurality in criminal conspiracy cases, the court distinguished the no-plurality rule of antitrust law as reflecting considerations unique to antitrust law and inapposite to section 1985(3).⁹⁶ The Third Circuit thus found no basis in precedent or policy for holding that agents of a single corporation cannot establish the plurality required for a civil rights conspiracy, and held that the agents did constitute the "two or more persons" required for violation of section 1985(3).

The majority position—that agents of a single corporation do not constitute a plurality capable of conspiracy under section 1985(3)—is a manifestation of the courts' desire to limit section 1985(3).⁹⁷ If the majority rule is not followed, a corporation can be held liable under section 1985(3) whenever two or more of its employees act to deprive an individual of his or her civil rights. Such an individual would have a private right of action. The *Dombrowski* rule in effect limits the potential for expansion of section 1985(3) into a federal tort law. The majority rule therefore is not based on requirements of conspiracy law, but instead reflects a concern related exclusively to section 1985(3).⁹⁸

making *Dombrowski* inapplicable. The court noted, however, that although the complaint described numerous acts of discrimination by the defendant against women employees, Novotny himself had suffered only one act of discrimination, his termination. 430 F. Supp. at 230.

94. 584 F.2d at 1257. Although accurate, this statement is not enlightening because it merely represents the same question as one of statutory construction: whether each individual is a "person" so that there are two or more persons involved, or whether the only "person" involved is the corporation, acting through multiple agents.

95. *Id.*

96. *Id.* at 1258 n.121.

97. See note 82 *supra*.

98. The majority rule has been criticized as unpersuasive, *Intracorporate Conspiracies*,

Corporations and Criminal Conspiracy

Historically, corporations were held immune from criminal liability⁹⁹ for a number of reasons.¹⁰⁰ Foremost among these was the requirement for all common law crimes that the actor have a *mens rea*, a criminal intent to commit the particular crime. As a corporation is a fictional entity, it was viewed as incapable of entertaining any such in-

supra note 38, at 485, analytically defective, *id.* at 477, and inexplicable from a policy standpoint, *The Impact of Novotny*, *supra* note 54, at 618 (majority rule and exceptions are based on "uncertain distinctions and a dearth of reasoned policy"). One commentator has argued in favor of abandoning the *Dombrowski* approach altogether and adopting the minority view articulated in *Novotny*. *The Impact of Novotny*, *supra* note 54, at 619. Another commentator has stated that, to the extent that the majority position reflects judicial concern that § 1985(3) be limited, the limitation could be better imposed through requirements directly related to substantive civil rights law than through an artificial or unwieldy definition of plurality. *Conspiracies Under 42 U.S.C. § 1985(c)*, *supra* note 38, at 485 ("A more defensible limitation, implicit in the statute and made explicit by the Supreme Court in *Breckenridge*, is the requirement that the discrimination be based not on personal antipathy toward the plaintiff but upon prejudice against a class defined by invidious criteria.") (footnote omitted).

99. See 1 W. BLACKSTONE, COMMENTARIES *476 ("[A] corporation cannot commit treason, or felony, or other crime, in [its] corporate capacity; though [its] other members may, in their distinct individual capacities."). American courts took the same position. See, e.g., *Androscoggin Water Power Co. v. Bethel Steam Mill Co.*, 64 Me. 441 (1875) (penalty for theft of logs inapplicable to corporation). See generally Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 827-28 (1927) [hereinafter cited as Edgerton]; Miller, *Corporate Criminal Liability: A Principle Extended to its Limits*, 38 FED. B.J. 49, 50 (1979) [hereinafter cited as Miller]; Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 HARV. L. REV. 283 (1946) [hereinafter cited as *Criminal Liability*].

100. One rationale for corporate immunity from criminal liability was the theory that criminal acts by agents of the corporation were *ultra vires* and therefore not imputable to the corporation. *Egan v. United States*, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943); F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 126 (6th ed. 1929); Edgerton, *supra* note 99, at 829; Stone, *supra* note 61, at 3 n.14. The *ultra vires* defense has long been discarded. See, e.g., *United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958) (partnerships can be guilty of willful violations of regulatory statutes); *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909) (corporations can be guilty of willful violations of regulatory statutes); see also Edgerton, *supra* note 99, at 839 ("[C]ourts have had to abandon at various points the old notion that *ultra vires* action is impossible. *Ultra vires* torts and *ultra vires* transfers of property create rights and liabilities. There is no reason for a distinction in this respect between torts and crimes.").

Additionally, some cases had suggested that the word "person" in criminal statutes did not include corporations. See, e.g., *State v. Cincinnati Fertilizer Co.*, 24 Ohio St. 611 (1874). See generally Edgerton, *supra* note 99, at 830. Today, however, it is clear that a corporation is a "person" within the scope of criminal statutes. 1 U.S.C. § 1 (1976) (the words "persons" and "whoever" include corporations unless context indicates otherwise); see *United States v. Union Supply Co.*, 215 U.S. 50, 54-55 (1909).

For a list of federal statutes under which corporations may be liable, see STAFF MEMORANDA ON RESPONSIBILITY FOR CRIMES INVOLVING CORPORATIONS AND OTHER ARTIFICIAL ENTITIES: SECTIONS 402-406 in WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 163, 207 app. (1970).

tent.¹⁰¹ Today, however, a corporation can possess the requisite *mens rea*.¹⁰²

The traditional view first was discarded in the mid-nineteenth century in cases involving strict liability crimes or civil offenses, in which no *mens rea* was required.¹⁰³ This distinction was later abandoned, and the *mens rea* of the corporation's agent was imputed to the corporation under the theory of respondeat superior.¹⁰⁴ In all jurisdictions today a corporation can be held liable for a crime.¹⁰⁵

There is, however, some dispute about the scope of this liability.¹⁰⁶

101. See, e.g., *Commonwealth v. Illinois Cent. R.R.*, 152 Ky. 320, 323, 153 S.W. 459, 460-61 (1913); *Pearks, Gunston & Tee, Ltd. v. Ward*, [1902] 2 K.B. 1, 11. See generally Edgerton, *supra* note 99, at 828-29; Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 22-23 (1957) (overview of the development of corporate criminal liability) [hereinafter cited as Mueller]; Stone, *supra* note 61, at 3 (evaluation of the present method of judging corporate wrongdoing).

102. *United States v. MacAndrews & Forbes Co.*, 149 F. 823, 836 (S.D.N.Y. 1906). See generally Edgerton, *supra* note 99, at 828 & n.11.

103. See, e.g., *State v. Morris & Essex R.R.*, 23 N.J.L. 360, 364 (1852) (corporation may be liable for misfeasance). See generally 2 V. MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 733, at 702 (2d ed. 1886) ("[When] the crime consists of the act alone, without regard to the intention with which it was committed; . . . there is no difficulty in attributing an offence of this character to a corporation, since it may be committed entirely through the company's agents."); Edgerton, *supra* note 99, at 832-36, 840-44 (arguing in support of corporate criminal liability); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1246 (1979) [hereinafter cited as *Developments—Corporate Crime*].

104. *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494 (1909); *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962); *United States v. Nearing*, 252 F. 223, 231 (S.D.N.Y. 1918). See generally Seventh Circuit Instructions § 5.03(a), Committee Comment (corporations liable through "application of respondeat superior principles to criminal statutes"); *Developments—Corporate Crime*, *supra* note 103, at 1246-51; Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 908-17 (1975); Note, *Corporate Criminal Liability*, 68 NW. U.L. REV. 870, 871-72 (1973).

105. See Stone, *supra* note 61, at 7-8. See generally Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 912-13 & n.30 (1975) (noting that every state has adopted corporate criminal liability); Edgerton, *supra* note 99, at 832-36 (law has moved from narrow views of corporate criminal responsibility towards broad views); Mueller, *supra* note 101, at 22 ("[F]rom position that corporation could not possibly incur criminal liability . . . the law has moved rapidly to the stand that a corporation can be guilty of most, if not all, crimes."); *Criminal Liability*, *supra* note 99 (analyzing whether a corporation should be liable for all crimes committed by its agents).

106. A majority of jurisdictions provide that a corporation is liable for the acts of its agents if the agent commits a crime within the scope of employment and with the intent to benefit the corporation. This standard of liability, based on the doctrine of respondeat superior, is the current common law rule in the federal courts. *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493-94 (1909); *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1158 (5th Cir. 1977); *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir.), cert. denied, 328 U.S. 869 (1946). See generally STAFF MEMORANDA ON RESPONSIBILITY FOR CRIMES INVOLVING CORPORATIONS AND OTHER ARTIFICIAL ENTITIES: SECTIONS 402-406 in WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL

The corporation generally is liable for the acts of its agents if the agent was acting in behalf of the corporation¹⁰⁷ and within the scope of his or her employment.¹⁰⁸ Moreover, the individual agent remains personally liable for the crime, notwithstanding the imposition of liability upon the corporation.¹⁰⁹

CRIMINAL LAWS 163, 169 n.8 (1970); *Developments—Corporate Crime*, *supra* note 103, at 1247. This same standard of respondeat superior is adopted in the proposed federal criminal code. See Criminal Code Reform Bill, S. 1722, 96th Cong., 1st Sess. (1979). Finally, this standard has been adopted by a majority of states. See *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 280, 275 N.E.2d 33, 86, *cert. denied*, 407 U.S. 914 (1971). See generally *Developments—Corporate Crime*, *supra* note 103, at 1247.

In contrast, a number of states have largely adopted the Model Penal Code's approach to corporate liability. See, e.g., ILL. REV. STAT. ch. 38, § 5-4 (1977); N.Y. PENAL LAW § 20.20 (McKinney 1975); 18 PA. CONS. STAT. ANN. tit. 18, § 307 (Purdon 1973). The Model Penal Code imposes vicarious liability on corporations, MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962); see *Developments—Corporate Crime*, *supra* note 103, at 1251-53, but limits liability in two significant ways. First, the corporation is not always liable for the acts of subordinate agents; under some circumstances, corporate liability is limited to acts authorized or recklessly tolerated by a high managerial agent. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962). Second, in some situations the corporation can defend against a criminal charge by demonstrating that a high managerial agent acted with due diligence to prevent the criminal act. MODEL PENAL CODE § 2.07(5) (Proposed Official Draft 1962).

107. MODEL PENAL CODE § 2.07(1)(a), (c) (Proposed Official Draft 1962); *United States v. Northside Realty Assoc., Inc.*, 474 F.2d 1164, 1168 (5th Cir. 1973); *United States v. Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966); *Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962). The requirement that the agent be acting in behalf of the corporation is sometimes expressed in terms of the agent's intent to benefit the corporation. See, e.g., *id.* at 128 ("the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation"); *Developments—Corporate Crime*, *supra* note 103, at 1250; Note, *Corporate Criminal Liability*, 68 NW. U.L. REV. 870, 874-75 (1973). Whether expressed as a requirement that the agent be acting "in behalf of" the corporation or "with the intent to benefit" the corporation, the concept is the same: the agent must be acting with intent to further the corporate interest. See generally Miller, *supra* note 99, at 59-61; *Developments—Corporate Crime*, *supra* note 103, at 1247-53.

108. MODEL PENAL CODE § 2.07(1)(a), (c) (Proposed Official Draft 1962); *Shumate & Co. v. National Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147, 151 (5th Cir. 1975); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

Although the Model Penal Code generally requires that the agent be acting "in behalf of the corporation within the scope of his office or employment" in order for the corporation to be liable, an exception is made for strict liability crimes and crimes based on an omission to discharge a specific duty. MODEL PENAL CODE § 2.07(1)(b), (2) (Proposed Official Draft 1962). See generally *Developments—Corporate Crime*, *supra* note 103, at 1251-53.

109. *United States v. Wise*, 370 U.S. 405 (1962); *United States v. Bach*, 151 F.2d 177, 179 (7th Cir. 1945); MODEL PENAL CODE § 2.07(6) (Proposed Official Draft 1962). See generally STAFF MEMORANDA ON RESPONSIBILITY FOR CRIMES INVOLVING CORPORATIONS AND OTHER ARTIFICIAL ENTITIES: SECTIONS 402-406 in WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 163, 207-08 (1970); *Developments—Corporate Crime*, *supra* note 103, at 1244; Note, *Corporate Criminal Liability*, 68 NW. U.L.

For the purpose of analyzing the plurality requirement of criminal conspiracy laws, the crucial feature of corporate liability is the principle of vicarious liability.¹¹⁰ The corporation is never an actual participant in any crime. Rather, when the required agency relationship is demonstrated,¹¹¹ the corporation will be held liable for the conduct of its agents.¹¹² The vicarious nature of corporate criminal liability often is overlooked,¹¹³ and should be emphasized to avoid confusion in analyzing plurality standards.¹¹⁴

REV. 870, 884-85 (1973); Note, *Individual Liability of Agents for Crimes Under the Proposed Federal Criminal Code*, 31 VAND. L. REV. 965 (1978).

110. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 33, at 231 (1972) ("corporate criminal liability is a form of vicarious liability"); Fisse, *The Distinction Between Primary and Vicarious Corporate Criminal Liability*, 41 AUSTL. L.J. 203, 205 (1967); Miller, *supra* note 99, at 49 n.3; *Criminal Liability*, *supra* note 99.

111. See note 106 *supra*.

112. Several commentators argue that respondeat superior as a doctrine of vicarious liability was designed to serve the goals of tort law and is inappropriate as a rule of criminal law. See Miller, *supra* note 99, at 68 ("Blindly applying tort principles of *respondeat superior* in the criminal context will only undermine the complex and difficult task of insuring corporate compliance with the law."); Mueller, *supra* note 101, at 39 ("The growth of corporate criminal liability was fostered by analogies from the law of torts. Many courts simply failed to appreciate any material difference between the two bodies of law."); *Criminal Liability*, *supra* note 99, at 285 ("[S]hifting of the burden of loss to consumers, which is a principal justification of respondeat superior in the law of torts, has no application in the criminal law."). But see Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 YALE L.J. 1091, 1096 (1976): "[T]ort analogy may be a misleading guide for determining entity liability [because it] overlooks the different policy considerations underlying criminal and civil penalties. In particular, although both criminal and civil law are concerned with deterring undesirable conduct, only the latter is concerned with compensating injured parties." Cf. Edgerton, *supra* note 99, at 835-36: "Why should a distinction be made between the criminal and the civil responsibility of a corporation for the acts of its agents? . . . What differences are there between crimes and torts which require or justify a narrower corporate responsibility for crimes than for tort? . . . The supposed difference in nature between crimes and torts is a difference in emphasis or point of view on the one hand, and in procedure on the other."

Several commentators have noted that, when respondeat superior is applied in a criminal context, one major anomaly has evolved. A principal who is a natural person is not criminally liable for the acts the agent committed without the principal's authorization, consent, or knowledge. In contrast, a principal who is a corporation is liable for the acts of its agents regardless of its lack of authorization or knowledge. See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW § 33, at 231; *Criminal Liability*, *supra* note 99, at 284-86.

113. "[T]he common law has long ceased thinking in terms of vicarious liability every time a corporation is said to breach the law and is convicted." Mueller, *supra* note 101, at 40.

114. The potential availability of either or both of two defendants—the individual and the corporation, see note 109 *supra*—has raised issues in other areas as well. One issue is the potential of abuse by the prosecution. See Stone, *supra* note 61, at 30 n.119.

The major problem has been inconsistency of verdicts. Juries have sometimes convicted the corporation but acquitted the individuals. This result is anomalous because, to convict the corporation, the jury must have found the individuals guilty. Although con-

Principles of Criminal Conspiracy

Criminal conspiracy is not easily defined.¹¹⁵ In the federal system,¹¹⁶ the crime of conspiracy is codified in one general conspiracy statute¹¹⁷ and numerous miscellaneous statutes.¹¹⁸ These statutes are skeletal, however, so the courts have defined and developed the law of

cerned with the issue, federal courts do not require consistency in verdicts. *See, e.g.,* *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950, 953 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959); *United States v. General Motors Corp.*, 121 F.2d 376, 411 (7th Cir.) *cert. denied*, 314 U.S. 618 (1941). *See generally* Miller, *supra* note 99, at 52 n.22; *Developments—Corporate Crime*, *supra* note 103, at 1249; Note, *Corporate Criminal Liability*, 68 Nw. U.L. REV. 870, 875-76 (1973); Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 YALE L.J. 1091, 1096-97 n.27 (1976); Note, *Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 292 n.50 (1961).

One commentator who favors abolishing corporate criminal liability altogether has argued that, if corporate liability were abolished, "juries would no longer act so erratically because they would not have to choose between corporate and individual liability." Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L.J. 908, 927 (1975). This argument is misleading because juries are not required to choose; corporate and individual liability are complementary, not mutually exclusive. *See* note 114 *supra*; *Developments—Corporate Crime*, *supra* note 103, at 1244.

115. "The modern crime of conspiracy is so vague that it almost defies definition." *Krulewicz v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring) (footnote omitted); *see also* Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941) ("In the long category of crimes there is none . . . more difficult to confine within the boundaries of definitive statement than conspiracy.") (footnote omitted); Sayre, *supra* note 2, at 398 (conspiracy is a doctrine "vague in its outlines"); *Developments—Criminal Conspiracy*, *supra* note 2, at 922 (discussing the substantive and procedural "formlessness" of criminal conspiracy).

116. This discussion emphasizes criminal conspiracy in the federal system because the majority of conspiracy prosecutions are brought in the federal system; state prosecutors rarely use the conspiracy laws. *See* Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 946-50 (1977) [hereinafter cited as Marcus]. While conspiracy is one of the most commonly charged crimes in the federal system, it is rarely charged in state systems for two reasons: first, state prosecutors primarily adjudicate local, violent crime, leaving to the federal prosecutors the more sophisticated interstate crimes that involve conspiracies; second, state prosecutors often lack the resources necessary to prosecute intricate schemes. *Id.*

117. *See* 18 U.S.C. § 371 (1976): "If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

118. Title 18 includes 26 other conspiracy statutes directed at specific conduct. *See, e.g.,* 18 U.S.C. § 224 (1976) (conspiracy to fix sporting contests); *id.* § 241 (1976) (conspiracy to intimidate citizen exercising constitutional rights); *id.* § 658 (1976) (conspiracy to defraud secured creditors); *id.* § 1201(c) (1976) (conspiracy to kidnap).

Conspiracy to violate the antitrust laws is also a crime. *See, e.g.,* 15 U.S.C. §§ 1, 2 (1976). Although antitrust conspiracies are criminal, they are considered separately throughout this Article, and are not included in the term "criminal conspiracy."

criminal conspiracy.¹¹⁹ Although criminal conspiracy is an elusive concept,¹²⁰ it can be defined as an agreement between two or more persons¹²¹ to commit a crime and an overt act by one of them in furtherance of the agreement.¹²²

Many reasons have been advanced for defining conspiracy as a crime.¹²³ Criminal liability for this inchoate or preparatory offense is premised on two elements: *mens rea* is found in the conspirators' agreement to commit a crime,¹²⁴ and the required *actus reus*¹²⁵ is found in the first overt act in carrying out that agreement.¹²⁶ Thus, the offense of conspiracy allows official intervention after a sufficiently definite expression of intent, but before the commission of the substantive crime that constitutes the goal of the conspiracy.¹²⁷

119. See Marcus, *supra* note 116, at 926 n.4 (noting that important Supreme Court decisions alone are numerous); Marcus, *The Proposed Federal Criminal Code: Conspiracy Provisions*, 1978 U. ILL. L.F. 379, 383 (the federal conspiracy offense has been defined by "literally thousands of reported decisions"); see also *Developments—Criminal Conspiracy*, *supra* note 2, at 923 (conspiracy in such a highly generalized form could only have developed in system of judge-made law).

120. For a summary of the significant current conflicts in authority as to the elements of criminal conspiracy, see note 149 *infra*.

121. To qualify as a conspiracy, at least two persons must be involved. See 18 U.S.C. § 371 (1976); *Morrison v. California*, 291 U.S. 82, 92 (1934). The term "person" includes corporations. 1 U.S.C. § 1 (1976).

122. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *United States v. Isaacs*, 516 F.2d 409, 410 (5th Cir.), *cert. denied*, 423 U.S. 936 (1975).

123. Criminal conspiracy is a difficult concept to justify as well as to define. According to one commentator, there are basic "conceptual difficulties involved in any attempt to explain the underlying theory of conspiracy and to relate this theory to generally applicable principles of criminal law." *Developments—Criminal Conspiracy*, *supra* note 2, at 922.

124. *United States v. Feola*, 420 U.S. 671, 694 (1975); MODEL PENAL CODE § 5.03, comment at 97 (Tent. Draft No. 10, 1960); Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1157 (1973) [hereinafter cited as Johnson]; Marcus, *supra* note 116, at 929.

125. Criminal liability is not imposed unless the defendant has committed an act. See, e.g., *Powell v. State of Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring). This requirement of an *actus reus* ensures that defendants are punished only for what they do and not for what they think. *Id.* at 543-44. See generally PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74 (1968).

126. See, e.g., *United States v. King*, 521 F.2d 61 (10th Cir. 1975) (conspiracy is not punishable as state of mind and becomes punishable only if accompanied by an overt act); *United States v. Small*, 472 F.2d 818 (3d Cir. 1972) (essential element of overt act is important in demonstrating more than subjective mental intent); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959) (function of overt act is to show that conspiracy has progressed from field of thought and talk into action).

127. The inchoate crime of conspiracy has been criticized as unnecessary in view of the law of attempt. Johnson, *supra* note 124, at 1161-64 (inchoate conspiracy unnecessary with Model Penal Code definition of attempt); Marcus, *supra* note 116, at 932 (general attempt statute could readily handle the inchoate aspect of most conspiracy offenses).

This "early intervention" rationale is one justification for charging the crime of conspiracy when that offense is inchoate.¹²⁸ In the federal system, however, conspiracy does not merge when the substantive crime has been achieved.¹²⁹ Once the substantive crime is complete, the primary justification for the charge is that collective action presents a greater risk to society than individual action and so warrants punishment in addition to that imposed for the substantive crime.¹³⁰ Collective action is said to be more dangerous for several reasons. First, the chances of harm to society increase as a result of group action because more participants make it more likely that the criminal object will be achieved.¹³¹ Second, what harm society suffers will be greater because the involvement of multiple participants allows increased efficiency through division of labor and achievement of more complex criminal objects.¹³² Third, an individual defendant involved in a conspiracy is less likely to quit the criminal enterprise¹³³ because the individuals provide each other with mutual support and encouragement.¹³⁴ Fourth, a conspiracy makes it less likely that the object crime will be detected.¹³⁵ Fifth, apart from the increased dangers related to the specific object of the conspiracy,¹³⁶ a conspiracy provides a focal point for the commis-

128. See Johnson, *supra* note 124, at 1157 ("almost the only justification offered by the drafters of the Model Penal Code for retaining the offense [of conspiracy] was the need to punish groups which engage in preparatory conduct").

129. *Pinkerton v. United States*, 328 U.S. 640 (1946).

130. *United States v. Feola*, 420 U.S. 671, 693 (1975); *Callanan v. United States*, 364 U.S. 587, 593 (1961); *Krulewitch v. United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). See generally Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413 (1959) (discussing the group danger rationale) [hereinafter cited as Goldstein]; *Developments—Criminal Conspiracy*, *supra* note 2, at 923-25 (same).

131. *Callanan v. United States*, 364 U.S. 587, 593 (1961) (Frankfurter, J.); *Krulewitch v. United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring); *United States v. Greer*, 476 F.2d 1064, 1071 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *Developments—Criminal Conspiracy*, *supra* note 2, at 924.

132. *Callanan v. United States*, 364 U.S. at 593 (Frankfurter, J.); *Krulewitch v. United States*, 336 U.S. at 448 (Jackson, J., concurring); *United States v. Boyle*, 482 F.2d 755, 766 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

133. *Callanan v. United States*, 364 U.S. at 593 (Frankfurter, J.).

134. *Developments—Criminal Conspiracy*, *supra* note 2, at 924.

135. *United States v. Rabinowich*, 238 U.S. 78, 88 (1915); Goldstein, *supra* note 130, at 413.

136. The authors of *Developments—Criminal Conspiracy* classify the arguments in favor of conspiracy into two general categories: the "specific object" rationale, which focuses on the dangers of conspiracy related to the likelihood that the conspirators will achieve the specific object of the conspiracy, and the "general danger" rationale, which focuses on dangers presented by conspiracy unrelated to its specific object. See generally *Developments—Criminal Conspiracy*, *supra* note 2, at 925.

sion of additional crimes unrelated to the initial object.¹³⁷ Sixth, a group endeavor provides each member with an education in crime.¹³⁸ Finally, the existence of a conspiracy produces antisocial effects because the knowledge that such groups exist makes the public uneasy.¹³⁹ These justifications, however, have never been proved empirically, and there is substantial disagreement regarding their validity.¹⁴⁰

Although criminal conspiracy is difficult to define and there is little consensus on the validity of the underlying assumptions, the effect of a conspiracy charge is immense.¹⁴¹ Conspiracy functions both as an inchoate or preparatory crime and as a substantive offense. As an inchoate crime, conspiracy allows police intervention before the object of the conspiracy is achieved.¹⁴² Yet, if the substantive offense is completed, the defendants remain liable for conspiracy along with the substantive offense.¹⁴³ Moreover, conspiracy is a basis for imposing

137. *Callanan v. United States*, 364 U.S. at 593-94; *Steele v. State*, 151 A.2d 127, 131 (Del. 1959); *Developments—Criminal Conspiracy*, *supra* note 2, at 924-25.

138. *United States v. Rabinowich*, 238 U.S. at 88; Goldstein, *supra* note 130, at 413.

139. *Developments—Criminal Conspiracy*, *supra* note 2, at 925.

140. These rationales are merely the suppositions of legislators, judges, and commentators. There is disagreement about whether conspiracy is more dangerous than individual action. In contrast to the explanations of why group action is more dangerous, one commentator suggests that group action actually may be less dangerous. "[T]here is as much reason to believe that a large number of participants will increase the prospect that the plan will be leaked as that it will be kept secret; or that the persons involved will share their uncertainties and dissuade each other as that each will stiffen the others' determination. Most probably, however, the factors ordinarily mentioned as warranting the crime of conspiracy would be found to add to the danger to be expected from a group in certain situations and not in others: the goals of the group and the personalities of the members would make any generalization unsafe and hence require some other explanation for treating conspiracy as a separate crime in all cases." Goldstein, *supra* note 130, at 414. This conclusion that group action is not always more dangerous than individual action and depends on the fact situation is today shared by many lawyers involved with the crime of conspiracy. In a survey conducted by Professor Marcus, the majority of respondents felt that conspiracy did not per se result in either greater or lesser danger to society, but that it depended on the specific fact situation. Marcus, *supra* note 116, at 934 (76.3% of respondents felt degree of danger depended on facts). Professor Marcus agreed with this conclusion. *Id.* at 966 ("group behavior is not always more dangerous than individual behavior").

141. Most of the ramifications of a conspiracy count are beneficial for the prosecutor, not for the defendant. Recognizing this, Justice Learned Hand characterized conspiracy as "that darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

142. See *United States v. Feola*, 420 U.S. 671, 694 (1975); *United States v. Bayer*, 331 U.S. 532, 542, *reh'g denied*, 332 U.S. 785 (1947); *United States v. Thompson*, 493 F.2d 305, 310 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974) (crime of conspiracy is complete with agreement to violate the law and one overt act and does not depend on the outcome of the planned scheme).

143. *Callanan v. United States*, 364 U.S. 587 (1961); *Beitel v. United States*, 306 F.2d 665, 670 (5th Cir. 1962); *United States v. Parnes*, 210 F.2d 141, 143 (2d Cir. 1954).

accomplice liability, rendering each member of the conspiracy liable for foreseeable crimes committed by all other members in furtherance of the conspiracy.¹⁴⁴

Despite the vagueness of its definition and the disagreement about its justifications, the crime of conspiracy has enormous effect in many areas¹⁴⁵ and is controversial.¹⁴⁶ There is controversy regarding the theories justifying defining conspiracy as a crime,¹⁴⁷ the several independent procedural doctrines triggered by the crime,¹⁴⁸ and the fundamental elements of a conspiracy.¹⁴⁹ In general, criminal conspiracy is a con-

144. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *United States v. Tilton*, 610 F.2d 302, 309 (5th Cir. 1980) (party to a continuing conspiracy can be held responsible for substantive offenses committed by co-conspirators if such acts were committed in furtherance of conspiracy, although the defendants neither participated in the acts nor actually knew about them).

145. The history of criminal conspiracy reflects a constant expansion of liability. Justice Cardozo stated that criminal conspiracy illustrates the "tendency of a principle to expand itself to the limit of its logic." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921), quoted in *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., with Frankfurter and Murphy, J.J., concurring).

146. A doctrine "so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought." Sayre, *supra* note 2, at 393 (footnote omitted); see also Marcus, *supra* note 116, at 926 (noting extensive analysis in law review articles and reported cases); *Developments—Criminal Conspiracy*, *supra* note 2, at 922 (noting widespread criticism from judicial and law review commentators).

147. See notes 127-40 & accompanying text *supra*.

148. See generally Johnson, *supra* note 124, at 1164-88. First, under the Federal Rules of Evidence, testimony of a co-conspirator against the defendant that would otherwise be hearsay is admissible as an exception to the hearsay rule. FED. R. EVID. 801(d)(2)(E). To come within this exception, the statement must be made during the course of and in furtherance of the conspiracy. *Id.*; see *Krulewitch v. United States*, 336 U.S. 440, 443 (1949). Second, a charge of conspiracy broadens considerably the appropriate venue for trial, because a conspirator may be tried in the district in which any conspirator committed an overt act or in the district in which the agreement was made. *Hyde v. United States*, 225 U.S. 347 (1912); *United States v. Boswell*, 372 F.2d 781 (4th Cir.), *cert. denied*, 387 U.S. 919 (1967). See generally *Developments—Criminal Conspiracy*, *supra* note 2, at 975-78. Third, conspiracy almost automatically allows the joinder of defendants at trial. FED. R. CRIM. P. 8(b). See generally Johnson, *supra* note 124, at 1166-75. Finally, a conspiracy count in effect extends the statute of limitations because the statute does not begin to run until the date of the last overt act committed in furtherance of the conspiracy. *Fiswick v. United States*, 329 U.S. 211, 216 (1946); *United States v. Fitzgerald*, 579 F.2d 1014 (7th Cir. 1978), *cert. denied*, 439 U.S. 1002 (1979); *United States v. Boyle*, 338 F. Supp. 1028 (D.D.C. 1972). An overt act that would be barred by the statute of limitations if prosecuted as a separate offense can still be proved at trial as an overt act pursuant to a conspiracy. *United States v. Portner*, 462 F.2d 678 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972); *United States v. Smith*, 412 F. Supp. 1 (S.D.N.Y. 1976). Although the defendant could not be convicted of the offenses barred by the statute of limitations, it would prejudice his or her position for the earlier crimes to be presented to the jury.

149. Controversy regarding the basic elements of a criminal conspiracy centers today on three questions. The first question is whether the conspiratorial agreement must be bilateral

fused area of the law.¹⁵⁰

One area of particular confusion in conspiracy law is the question of what constitutes the required plurality in an intracorporate situation. Generally, when an agent acting within the scope of employment commits a crime on behalf of a corporation, both the agent and the corporation may be held liable for the substantive crime. If the agent and the corporation are deemed to be a plurality, they may also be held

or whether a unilateral agreement is sufficient. The current federal position requires a bilateral agreement. 18 U.S.C. § 371 (1976) ("if two or more persons conspire"); see *Morrison v. California*, 291 U.S. 82, 92 (1934). The position of the proposed federal criminal code is not clear. See Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DEPAUL L. REV. 75, 82-83 (1979); Marcus, *The Proposed Federal Criminal Code: Conspiracy Provisions*, 1978 U. ILL. L.F. 379, 385-86. The Model Penal Code adopted the unilateral theory, MODEL PENAL CODE § 5.03 (Proposed Official Draft 1962), and 30 states have followed that approach. See Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DEPAUL L. REV. 75, 75-76 n.3 (1979).

The second question is whether an overt act is a material element of a criminal conspiracy. The current general federal conspiracy statute and the proposed federal conspiracy provision both require an overt act. See 18 U.S.C. § 371 (1976) ("and one or more . . . persons do any act to effect the object of the conspiracy"); S. 1437 and H.R. 6869, § 1002(a) ("one of such persons . . . engages in any conduct"). See generally Marcus, *The Proposed Federal Criminal Code: Conspiracy Provisions*, 1978 U. ILL. L.F. 379, 386-87. The Model Penal Code also requires an overt act. MODEL PENAL CODE § 5.03(5) (Proposed Official Draft 1962). Only about half the states, however, currently require proof of an overt act. See Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DEPAUL L. REV. 75, 101 & n.153 (1979).

The third question is whether the object of the conspiracy must be a crime. The current federal statute is not limited to conspiracies whose object is a crime; it prohibits conspiracies "either to commit any offense against the United States, or to defraud the United States . . ." 18 U.S.C. § 371 (1976); see also *United States v. Peltz*, 433 F.2d 48, 51 (2d Cir. 1970) (§ 371 "punishes a conspiracy to defraud although the fraud may not constitute a substantive offense"); *United States v. Levinson*, 405 F.2d 971, 977 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969) (§ 371 prohibits conspiracies having as their purpose the impairing, obstructing or defeating of the lawful function of any government department). See generally Goldstein, *supra* note 130. The proposed federal criminal code would change the law and limit the definition of a conspiracy to an agreement whose object is itself a crime. See S. 1437 and H.R. 6869 § 1002(a) ("A person is guilty of an offense if he agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes . . ."). See generally Marcus, *The Proposed Federal Criminal Code: Conspiracy Provisions*, 1978 U. ILL. L.F. 379, 383. The Model Penal Code also limits the definition of conspiracy to agreements to commit a crime. MODEL PENAL CODE § 5.03(1) (Proposed Official Draft 1962). Many states, in contrast, allow conspiracy prosecutions to reach agreements to commit any act injurious to public health, morals, trade or commerce. See, e.g., CAL. PENAL CODE § 182(5) (West 1970); MISS. CODE ANN. § 97-1-1(f) (1972). See generally Marcus, *supra* note 116, at 963-65; Sayre, *supra* note 2, at 405-06.

150. The confusion surrounding conspiracy has been recognized by two leading conspiracy scholars. Johnson, *supra* note 124, at 1139 ("What conspiracy adds to the law is simply confusion, and the confusion is inherent in the nature of the doctrine."); Marcus, *supra* note 116, at 967 ("Until the charge of criminal conspiracy is curbed, the conspiracy doctrine will remain the source of considerable confusion . . .").

liable for conspiracy.¹⁵¹ In a situation in which multiple agents acting within the scope of employment conspire to commit a crime on behalf of a corporation, both the agents and corporation are liable for the substantive crime. If the agents are defined as a plurality, the agents and the corporation also might be liable for conspiracy.

Plurality Under the Criminal Conspiracy Laws

Courts¹⁵² and commentators¹⁵³ have suggested that criminal conspiracy can be found within a single corporation, at least when several agents of that corporation are involved. Decisions continue to conflict,¹⁵⁴ however, and it has been observed that the law remains unsettled.¹⁵⁵ The law of conspiratorial plurality is difficult to decipher both because of liberal pleading and proof requirements¹⁵⁶ and because the

151. This is true in the federal system because the crime of conspiracy does not merge into the substantive crime. *Pinkerton v. United States*, 328 U.S. 640 (1946).

152. *See, e.g.*, *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1258 (3d Cir. 1978) (en banc), *vacated and remanded on other grounds*, 442 U.S. 366 (1979) ("well-established line of precedent" indicates that, apart from antitrust area in which corporation commits a substantive crime, officers who caused corporation to act are liable for criminal conspiracy).

153. *See, e.g.*, L. SULLIVAN, ANTITRUST 324 (1977) ("where corporation commits a substantive crime, the officers and directors who caused it to act are guilty of criminal conspiracy"); ATT'Y GEN., REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 30 (1955) ("It has long been the law that where a corporation commits a substantive crime, the officers and directors who participated in the illicit venture are guilty of criminal conspiracy.").

154. *Compare* *United States v. Allied Chem. Corp.*, No. 76-0129, slip op. at 1-2 (E.D. Va. July 6, 1976) (five individual employees and the corporation did not constitute a plurality) *with* *United States v. Consolidated Coal Co.*, 424 F. Supp. 577 (S.D. Ohio 1976) (plurality may be established by employees and their employer-corporation).

155. *See, e.g.*, *United States v. Consolidated Coal Co.*, 424 F. Supp. 577 (S.D. Ohio 1976). The court stated that it had not found any case that "analyzed the precise question" before it, that is, the existence of plurality between several employees of a single corporation and the corporation. *Id.* at 580.

156. Determining whether the plurality requirement of conspiracy is satisfied is particularly difficult in the criminal law because of conspiracy pleading rules. First, the defendant's co-conspirators need not be charged; a single individual may be convicted of conspiring with persons named in the indictment as co-conspirators although only the defendant was indicted. *United States v. Lance*, 536 F.2d 1065 (5th Cir. 1976); *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965). This rule is sound because the government should be allowed to exercise its discretion about whom to charge. But it is not even necessary that the co-conspirators be identified in the indictment; a single defendant may be convicted when the indictment refers to unidentified co-conspirators. *Rogers v. United States*, 340 U.S. 367, 375 (1951); *Blumenthal v. United States*, 332 U.S. 539, 556-57 (1947); *United States v. Booty*, 621 F.2d 1291 (5th Cir. 1980). This rule is reflected in the language included in most conspiracy indictments to the effect that the defendant conspired with "others known and unknown" to the grand jury. *See, e.g.*, *United States v. Glickman*, 604 F.2d 625, 631 (9th Cir.), *cert. denied*, 444 U.S. 1080 (1979) ("others known and unknown"). Such language generally is

courts that have addressed the issue frequently have not been explicit in their reasoning.¹⁵⁷

Conspiracy Between a Single Agent and the Corporation

Whether a single agent and his or her corporate employer can constitute a conspiratorial plurality first was considered in *United States v. Santa Rita Store Co.*¹⁵⁸ In *Santa Rita*, four defendants were indicted for violating section 1 of the Sherman Act.¹⁵⁹ The four defendants included two companies, the Santa Rita Mining Company and the Santa Rita Store Company, and two individuals: Deegan, the general agent in charge of both companies, and Young, an employee of both companies. The indictment charged the defendants with conspiracy to force employees and tenants of the two companies to trade with them exclusively by threatening the loss of their jobs and leases.

After trial, the two individual defendants were acquitted and the two companies convicted.¹⁶⁰ The companies moved for a judgment of acquittal, arguing that conspiracy was legally impossible due to lack of plurality. The court held that there was no conspiracy "because of a

included in the indictment even where the chances of a failure of plurality are remote. *See, e.g., United States v. Elliot*, 571 F.2d 880, 895 (5th Cir. 1978) (conspiracy to violate RICO) (indictment identified 43 conspirators of whom six were indicted; nonetheless, indictment also referred to "others to the grand jury known and unknown").

The result is that a single defendant may be convicted of conspiracy if the indictment alleges the existence of unknown co-conspirators. *United States v. Espinosa-Cerpa*, 630 F.2d 328 (5th Cir. 1980); *United States v. Fleming*, 504 F.2d 1045 (7th Cir. 1974). As courts are often not as meticulous as they might be in recounting the specific allegations of the indictment, it frequently is impossible to determine whether there were unknown conspirators involved and if so, whether the court relied on them to establish plurality. *See, e.g., United States v. Nearing*, 252 F. 223 (S.D.N.Y. 1918), discussed in text accompanying notes 170-72 *infra*.

157. *See United States v. Carroll*, 144 F. Supp. 939 (S.D.N.Y. 1956), discussed in text accompanying notes 162-69 *infra*. The court in *Carroll*, faced with a criminal conspiracy case involving a corporation and a single agent, relied on antitrust and civil conspiracy precedents, and failed to distinguish the case before it from cases on which it relied that involved multiple agents. In *United States v. Nearing*, 252 F. 223 (S.D.N.Y. 1918), discussed in text accompanying notes 173-75 *infra*, the court failed to indicate clearly whether the conspiracy conviction was based on a plurality made up of the corporation and the single, named agent, or whether other individuals, not named as defendants but nonetheless involved, were relied on to find a plurality.

158. 16 N.M. 3, 113 P. 620 (1911).

159. Although this case involved a criminal antitrust conspiracy rather than a general criminal conspiracy, the court resolved the plurality question by reference to general principles of criminal law and did not invoke any principles unique to antitrust law. Thus, the case is more appropriate to a discussion of general conspiracy law than to antitrust law.

160. This pattern of convicting the companies while acquitting the individual results so frequently that it has become a subject of controversy. *See* note 114 *supra*.

lack of persons,"¹⁶¹ first recounting that there was no evidence that anyone other than Deegan was involved in the criminal acts, and then stating that a conspiracy could not exist between two companies when the liability of both is established by a single agent; there must be at least two minds to constitute a conspiracy.

A more recent case considering plurality based on the actions of a single agent is *United States v. Carroll*.¹⁶² The indictment charged the defendants with misrepresentation and conspiracy to use and acquire gold in violation of the gold laws. The indictment originally included five defendants: Sheba Bracelets, Inc. and four individual agents of the corporation. The government severed the case against two of the individuals before trial¹⁶³ and further dismissed charges against a third individual at the close of its case. Only two defendants then remained: the corporation and its sole owner, Carroll.

The government contended that Carroll had conspired with the corporation. Noting that the corporation was dominated by Carroll, the court rejected this argument. A conspiracy "between the defendant Carroll and the business institution he used to carry out his purposes . . . [w]ould over-extend the fiction of corporate personality."¹⁶⁴ Observing that several antitrust cases had held that a corporation could be liable as a conspirator, the court distinguished these cases because, in each, the defendant corporation conspired not with its own employee, but with either another corporation or with individuals who were not employees of the defendant corporation. Relying primarily on an antitrust case involving multiple agents, *Nelson Radio & Supply Co. v. Motorola, Inc.*,¹⁶⁵ the court found that a corporation is not liable as a conspirator in "situations similar to the facts at hand."¹⁶⁶

161. 16 N.M. at 9-10, 113 P. at 620. "Undoubtedly, a conspiracy might be formed by two corporations acting through agents, yet there must be more than one agent or more than one person actually engaged in the formation of the conspiracy. In this case a conspiracy was not formed because of a lack of persons. . . . The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone." *Cf. Union Pacific Coal Co. v. United States*, 173 F. 737 (8th Cir. 1909), discussed in text accompanying notes 20-21 *supra*.

162. 144 F. Supp. 939 (S.D.N.Y. 1956).

163. *Id.* at 941.

164. *Id.*

165. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), discussed in text accompanying notes 36-38 *supra*.

166. 144 F. Supp. at 942. The court also cited two cases that involved conspiracy charges based on the acts of a single individual, but neither involved criminal conspiracy. *Lockwood Grader Corp. v. Bockhaus*, 129 Colo. 339, 270 P.2d 193 (1954) (civil conspiracy); *United States v. Santa Rita Store Co.*, 16 N.M. 3, 113 P. 620 (1911) (antitrust conspiracy).

The analysis of the intracorporate conspiracy question in *Carroll* is weak for several reasons. First, it is not clear what happened to the two agents whose cases were severed. The severance of their cases from Carroll's should have had no impact on their status as Carroll's co-conspirators. Yet the severed defendants must have been unavailable to establish the plurality for Carroll's conviction, because the government relied on the weaker argument that Carroll conspired with the corporation. This point was not clarified by the court.

Second, the court failed to distinguish the situation before it, involving just one natural person, from situations involving multiple natural persons.¹⁶⁷ Moreover, the court's reliance on antitrust and civil conspiracy precedents¹⁶⁸ was inappropriate, because conspiracy laws in those areas further goals different from those of the general criminal law.

In addition, the *Carroll* court indicated that the corporation was a sham, dominated and manipulated by its sole owner, Carroll, and focused on this as the basis for its ruling.¹⁶⁹ Limiting the holding in this fashion is confusing because it suggests that one agent acting alone may conspire with his or her corporation if the agent does not dominate the corporation. Such a distinction would lead to anomalous results because plurality would depend upon the significance of the agent's role in the corporation, an essentially irrelevant criterion. Thus, although *Carroll* does hold that one agent acting alone is not liable for conspiring with the corporation when he or she commits a crime while acting within the scope of employment, the analysis is somewhat weak.

Two additional cases appear to have decided whether plurality exists when one agent acting within the scope of employment commits a crime. Neither case explicitly analyzed the issue, but both implicitly held that plurality is established in such situations. In the first case, *United States v. Nearing*,¹⁷⁰ two defendants, Scott Nearing and the American Socialist Society, were charged with conspiracy to commit espionage, conspiracy to cause insubordination in the military, and conspiracy to obstruct recruiting and enlistment in the military. The defendants contended that a corporation is immune from conspiracy charges because a corporation is incapable of entertaining a specific

167. The court relied on cases involving multiple agents of a single corporation: *State v. Parker*, 114 Conn. 354, 158 A. 797 (1932); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

168. 144 F. Supp. at 942.

169. *Id.* at 941.

170. 252 F. 223 (S.D.N.Y. 1918).

criminal intent. The court disagreed, concluding that the acts and intent of corporate agents are imputed to the corporation to render it liable criminally.¹⁷¹

Although the facts are not clear, *Nearing* must have been an agent of the American Socialist Society for his alleged crimes to be imputed to the society under the principles of corporate liability discussed by the court. The court does not refer to any other individual being involved in the conspiracy. Assuming that there were no other conspirators, the *Nearing* court found a conspiracy based on the activities of one natural person who committed a crime as an agent for a corporation and so became a conspirator with the corporation.¹⁷²

Another case that appears to find a conspiracy between an agent and a corporation is *United States v. Lowder*.¹⁷³ The indictment named one individual, W. Horace Lowder, and six corporations that were owned by Lowder and his family.¹⁷⁴ The seven defendants were charged with conspiracy to defraud the United States by preventing the Internal Revenue Service from collecting taxes owed by four of the six corporations. All the defendants were convicted of conspiracy.¹⁷⁵

Lowder appealed, but did not question whether he and the six corporations established the plurality of parties necessary for a conspiracy. The facts as recounted by the court do not indicate that any other individual was involved. If only one natural person and therefore only one mind was involved, arguably the conspiracy plurality requirement was not met. At any rate, the point was not raised, the plurality question was not addressed or analyzed, and Lowder's conspiracy conviction was affirmed.

Although *Nearing* and *Lowder* appear to find conspiracies based on the actions of a single agent, the courts did not note whether individuals other than the defendants were involved, and apparently did not consider the lack of plurality defense. Although it may be inferred from these decisions that conspiracy convictions may be based on the

171. *Id.* at 231.

172. The government also charged that "certain unknown persons" were involved in the conspiracy, and the court referred to acts of the officers of the American Socialist Society. *Id.*

173. 492 F.2d 953 (4th Cir. 1974).

174. The Lowder family owned from 11 1/2% to 100% of each corporate defendant. The court characterized the relationship between Lowder and the corporations as an "intimate connection." *Id.* at 954.

175. The seven defendants also were indicted on two counts for filing false income tax returns; on these counts, the corporations were acquitted and Lowder was convicted. *Id.* at 955.

actions of one individual working within the scope of employment, the decisions did not explicitly establish this proposition. In the other two cases, *Santa Rita* and *Carroll*, however, the courts indicated that only one individual was involved; these courts did hold that the alleged conspiracy failed for lack of plurality.

In general, therefore, when an agent acting alone commits a crime within the scope of employment, the stronger authority supports the proposition that a conspiracy does not exist because of a lack of plurality. This result is premised on the presence of only one mind, and on the notion that a finding of plurality would unreasonably expand the fiction of corporate personality. The critical question that must be answered by courts faced with this issue is which holding will best further the stated goals of criminal conspiracy laws.

The primary rationale of conspiracy law is that collective action is more dangerous to society because both the likelihood and the seriousness of harm to society are increased because of the greater power created by group action.¹⁷⁶ Arguably, an agent who has access to corporate resources commands an increased potential for harm; the corporation magnifies this power just as the assistance of another individual would. Under this rationale, the definition of plurality should include the situation in which an agent commits a crime using corporate resources. It is difficult to imagine a single natural person conspiring with a corporation, but if assigning liability for such a combination serves a sound policy, the law perhaps should find a method by which to implement the policy.¹⁷⁷ One possible theory might be that, although only one natural person was involved, that person was acting in a dual capacity: both as an individual and as an agent of the corporation. Thus, the corporation could be included as a conspirator acting through an agent to establish plurality.

176. See notes 123-40 & accompanying text *supra*.

177. Sayre, *supra* note 2, at 412: "But the law, which after all exists primarily to achieve justice and thus to promote social peace and equilibrium, must not be bound down too arbitrarily by logical or purely analytical considerations any more than by the iron grip of historical precedents and correctly traced legal genealogies. If the purpose of legal doctrine is to promote the social security and well-being, they must be examined functionally and tested by the degree of protection which they afford to social and to individual interests or rights."

Cf. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 25 (1928): "But the doctrine that an individual, though he does not in any way communicate or act in conjunction with another mortal soul, may nevertheless by his wrongdoing be abetting or conspiring with that immortal entity, the corporation, is one of those peculiar judicial fancies that, were it not for the desirable results often achieved by their use, would be unqualifiedly condemned by all save those whose naive faith in the metaphysician's logic cannot be disturbed by earthly facts."

Several problems exist with this approach. A finding of conspiracy liability based on the participation of a corporation is defensible only to the extent that the corporation increases the individual's power to harm society. Other rationales for conspiracy law, however, would not be served if conspiracy liability were imposed in this situation. The increased dangers thought to be presented by the mutual support provided by conspirators and the decreased opportunity for discovery of the planned crime are not present when only one of the conspirators is an individual. Similarly, the increased danger posed by a conspiracy because it provides a focal point for additional crimes and criminal education also is absent when only one individual is involved. These concerns of conspiracy law are implicated only if more than one of the conspirators is a natural person.¹⁷⁸ Therefore, while some arguments can be made in favor of imposing conspiracy liability, equally persuasive arguments can be raised against liability.

A further problem with this approach is the requirement of an agreement. Even if plurality is defined to exist when one person acting within the scope of employment commits a crime, conspiracy liability cannot be imposed unless an agreement is established.¹⁷⁹ Conceivably, an agreement may exist between the individual and the corporation on the theory that the individual was acting in a dual capacity, and therefore both the individual and the corporation must be deemed to have agreed on the course of conduct pursued. This approach is undesirable; it forces distortion of the definition of agreement beyond any rational or commonly understood meaning.¹⁸⁰

178. *Developments—Criminal Conspiracy*, *supra* note 2, at 952: "[A] single person is not punishable for intending to perform an act merely because he has at hand to effect his intent means which can cause greater harm than could be produced were these means lacking. . . . [A] trustee, intending to accomplish an unlawful object by means of his trust would not be punished for conspiracy although the aggregate of economic power which he controls might enable him to effect more damage than would be possible were he acting without the trust. Although the corporation has legal personality for most purposes, for purposes of determining whether there is a conspiracy the case of an agent and his corporation, when the agent is the sole human actor, seems analogous to that of the trustee and his trust. The corporation seems an inanimate object analogous to a . . . trust. Plurality in the context of conspiracy should be viewed as a *plurality of human minds*, each of which is able to contribute consciously to the furtherance of the conspiracy." (footnote omitted) (emphasis added).

179. Agreement is clearly an element of criminal conspiracy. *United States v. Bailey*, 607 F.2d 237 (9th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980). The courts often refer to agreement as the "gist" of a conspiracy. *See, e.g.*, *United States v. Heller*, 625 F.2d 594 (5th Cir. 1980); *United States v. Wander*, 601 F.2d 1251 (3rd Cir. 1979); *United States v. Fruehauf Corp.*, 577 F.2d 1038 (6th Cir.), *cert. denied*, 439 U.S. 953 (1978).

180. The definition of agreement recently has been expanded in another context. Traditionally, when one of two persons feigned agreement, the other party was deemed not to be

In sum, the actions of a single agent of a corporation should not constitute a plurality. A finding of plurality would not further all the supposed goals of criminal conspiracy laws and would be contrary to the commonly accepted definitions of an agreement to conspire. The cases addressing this question support the point of view that criminal conspiratorial liability cannot be established by a single agent of a corporation.

Conspiracy Among Several Agents of a Single Corporation

The question whether multiple agents of the same corporation constitute a plurality is also difficult to resolve. One reason for this difficulty is that the issue is not often raised or analyzed.¹⁸¹ Several of the cases most frequently cited for the proposition that multiple agents are a plurality do not specifically address the question and reach that conclusion only implicitly.

Unreasoned Decisions

In one of the most frequently cited decisions, *Nye & Nissen v. United States*,¹⁸² the indictment charged five defendants with filing false invoices and with conspiracy to defraud the United States. The defendants were Nye & Nissen, a corporation, and four individual agents: Moncharsh, the president, director, and owner of thirty-three percent of the corporation;¹⁸³ Berman, a city sales manager; Goddard, a shipping and receiving clerk; and Menges, an agent whose function was not identified. Moncharsh, Berman, Goddard, and the corporation were convicted, and Moncharsh and the corporation appealed.

The Supreme Court affirmed their convictions,¹⁸⁴ holding that the evidence was sufficient to establish that Moncharsh aided and abetted filing of the false invoices. Although the several agents and their corporation were convicted of conspiracy, the questions on appeal focused only on the substantive counts of filing false invoices.¹⁸⁵ Consequently,

conspiring with anyone despite his or her intent and attempt to agree. The Model Penal Code, however, has adopted the theory of unilateral conspiracy and would sustain a conspiracy conviction in a situation in which one actor only feigned agreement. See MODEL PENAL CODE § 5.03(1)(a) (Proposed Official Draft 1962); MODEL PENAL CODE § 5.03 comment at 104-06 (Tent. Draft No. 10, 1960).

181. Liberal conspiracy pleading rules hinder analysis of the multiple agent plurality cases, just as they affect the single agent cases. See note 156 *supra*.

182. 336 U.S. 613 (1949).

183. Moncharsh, the president and director, actually owned one-third of the stock of a holding company that wholly owned Nye & Nissen. *Id.* at 614.

184. *Id.* at 620.

185. See *id.* at 618-19.

the *Nye & Nissen* court cannot be said to have endorsed a finding of plurality.

A similar lack of analysis was demonstrated in *Alamo Fence Company v. United States*.¹⁸⁶ The indictment included eighteen counts for submitting false statements on loans insured by the Federal Housing Authority¹⁸⁷ and one count for conspiracy to submit false statements.¹⁸⁸ The parties indicted included the Alamo Fence Company, its president and general manager, the officer manager, and an unspecified number of subordinate employees. The company was convicted on the conspiracy count and thirteen of the eighteen substantive counts. The court did not recount the fate of the individuals.¹⁸⁹ Again, the question of intracorporate conspiracy was not addressed on appeal and the conviction was affirmed.¹⁹⁰

Rational Approaches to Plurality

Although these cases implicitly hold that multiple agents of a single corporation constitute a plurality, they are unenlightening because the courts do not discuss the issue. In contrast, in several other cases the courts actually have attempted to define plurality. In *State v.*

186. 240 F.2d 179 (5th Cir. 1957).

187. Intentionally making a false statement to influence in any way Federal Housing Administration loan transactions constitutes a violation of 18 U.S.C. § 1010 (1976).

188. See 18 U.S.C. § 371 (1976).

189. It would not have been surprising for the individuals to have been acquitted while the corporation was convicted. See note 114 *supra*.

190. 240 F.2d at 183.

In *Mininsohn v. United States*, 101 F.2d 477 (3d Cir. 1939), three defendants were indicted for conspiracy to defraud the United States by submitting fraudulent claims for underweight bags of cement delivered to government building projects. The three defendants were two brothers, Jacob and Max Mininsohn, and the Interstate Lumber Company, a corporation owned and controlled by the Mininsohns. The three defendants were convicted, and Jacob and the corporation appealed.

On appeal, the Third Circuit held that there was sufficient evidence of conspiracy against Jacob to present a question for the jury, and that the guilty intent of corporate officers would be imputed to the corporation. The convictions of both Jacob and the corporation were affirmed. No question of intracorporate conspiracy was argued or analyzed.

In *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943), the indictment charged the Union Electric Company of Missouri and its president and director, Egan, with conspiracy to violate the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1935), by creating and maintaining a slush fund for political contributions. Also named in the indictment as unindicted co-conspirators were Boehm, a director, and Laun, a vice-president of the company. Egan and the company were both convicted on the conspiracy count, and they appealed.

On appeal, the question of intracorporate plurality was not presented or discussed. Thus, as in the previous cases, conspiracy convictions were affirmed based on a conspiracy among agents of a single company, although the specific issue was not argued or analyzed.

Parker,¹⁹¹ for example, the information charged four defendants with conspiracy to convert to corporate use funds that were paid to the corporation in its capacity as a trustee. The defendants were the Parker-Smith Company and three individuals who were the sole directors and officers of the corporation.

Appealing their convictions, the four defendants argued that the corporation was incapable of forming a criminal intent, and thus could not be included in the plurality necessary to find a conspiracy. The court first noted that this issue was moot because plurality clearly was established by the three individual officers of the corporation. Nevertheless, the court asserted that criminal intent could be imputed to a corporation, and so the corporation could be a party to conspiracy.¹⁹²

In *United States v. Bridell*,¹⁹³ the defendants were indicted for conspiring to attempt to evade payment of income taxes.¹⁹⁴ The three defendants included the Carbon Corporation; Bridell, who was the president as well as a director and shareholder of Carbon; and Blauner, the treasurer, also a director and shareholder. The defendants argued that there could be no conspiracy between a corporation and its officers, citing *Carroll*.¹⁹⁵ The court merely responded that "the conspiracy count does not overextend the fiction of corporate personality in the instant case."¹⁹⁶ The court concluded, however, that the evidence was insufficient to establish a conspiracy, and acquitted all the defendants on that basis.

The *Bridell* opinion may not provide any useful analysis for courts faced with the plurality issue. The court's statement that the conspiracy count did not "overextend the fiction of corporate personality in the instant case" mimics the language of *Carroll*.¹⁹⁷ Any reliance that the *Bridell* court may have placed on *Carroll*, however, was misplaced. *Carroll* considered a question different from that presented in *Bridell*. *Carroll* involved only one party, acting alone on behalf of a corporation. In contrast, *Bridell* involved *two* agents acting for a corporation. Thus the question in *Bridell* was not whether the legal fiction of corpo-

191. 114 Conn. 354, 158 A. 797 (1932).

192. The court concluded that a corporation may be "counted in computing the number necessary to constitute [the conspiracy]." *Id.* at 364, 158 A. at 801.

193. 180 F. Supp. 268 (N.D. Ill. 1960).

194. *Id.* at 273.

195. See *United States v. Carroll*, 144 F. Supp. 939 (S.D.N.Y. 1956), discussed in notes 162-69 & accompanying text *supra*.

196. 180 F. Supp. at 273.

197. See *United States v. Carroll*, 144 F. Supp. at 941.

rate personality would be overextended, but rather whether defendants Bridell and Blauner constituted a plurality.

In *United States v. Kemmel*,¹⁹⁸ the indictment charged three defendants with conspiring to defraud the United States in their performance of a government contract. The defendants were Kemmel, Inc.; John B. Kemmel, its president and principal shareholder; and Frank Laurelli, an employee of Kemmel, Inc. and superintendent of the government job in question.¹⁹⁹

Kemmel, Inc. filed a motion to dismiss the indictment on the ground that a corporation is "incapable of being a party to a conspiracy."²⁰⁰ In response, the court cited numerous cases finding conspiracies among corporations and their officers and agents. Many of these, however, were antitrust cases,²⁰¹ and none analyzed the question of the plurality requirement in intracorporate conspiracy under the general criminal laws. After this extensive citation of cases,²⁰² the court provided no explanation of its own holding and held that conspiracy was properly charged. In the final paragraph of its opinion, the court further obscured its ruling by suggesting that it relied on the involvement of some "others to the grand jury unknown."²⁰³

In *United States v. Allied Chemical Corp.*,²⁰⁴ the corporation and five individual employees and agents were charged with conspiracy. After indictment, the government stipulated that, despite the indictment's reference to "divers other persons,"²⁰⁵ there were in fact no conspirators other than the six named defendants.²⁰⁶ The court dismissed the conspiracy count against the corporation.

Although the analysis in *Allied Chemical* is more helpful than the

198. 160 F. Supp. 718 (M.D. Pa. 1958).

199. The indictment included the standard allegations that the defendants conspired among themselves and with "diverse other persons to the Grand Jury unknown." *Id.* at 719.

200. *Id.* at 718-19. Defendant apparently relied on *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946), but the court stated that *Holland* must be limited to its own facts. 160 F.Supp. at 720.

201. 160 F. Supp. at 720 (citing *White Bear Theatre Corp. v. State Theater Corp.*, 129 F.2d 600 (8th Cir. 1942) (civil antitrust); *United States v. MacAndrews & Forbes Co.*, 149 F. Supp. 823 (S.D.N.Y. 1906) (criminal antitrust)).

202. On the question of the liability of a corporation for criminal conspiracy, the court provided no fewer than 54 citations. 160 F. Supp. at 720-21.

203. "The present indictment charges that Kemmel, Laurelli, the corporation, and others to the grand jury unknown, conspired. Assuming, as we must on a motion to dismiss, the allegations of the indictment to be true, we hold that a conspiracy as to the corporation and others has been properly charged." *Id.* at 721.

204. No. 76-0129, slip op. (E.D. Va. July 6, 1976).

205. *Id.* at 1.

206. *Id.*

many criminal cases that rule on questions of plurality only implicitly, it suffers from two weaknesses. First, the court relied exclusively on civil antitrust and breach of contract conspiracy cases for precedents. The plurality standards in those areas reflect concerns unique to the substantive law and are therefore inappropriate precedents outside those areas.²⁰⁷

The second weakness of *Allied Chemical* is that the court posed the question incorrectly, inquiring whether the corporation conspired with itself. In this respect, the *Allied Chemical* decision illustrates a difficulty in analyzing the definition of plurality: the cases consistently frame the issue inaccurately. The question is not whether the corporation can conspire with itself²⁰⁸ or whether the corporation can conspire with its agents.²⁰⁹ A corporation is liable only vicariously, through the actions of its agents.²¹⁰ Properly posed, the question is in two parts: whether multiple agents of a single corporation constitute a plurality; and, if so, whether the standards of corporate criminal liability are met so that the corporation is vicariously liable for the conspiracies of its agents. If the agents of a single company do compose a plurality, they may be held liable as conspirators. If the agents compose a plurality and the standards of corporate criminal liability are met, then the individual agents and the corporation may be held liable as conspirators. The question of plurality is entirely separate from the question of corporate criminal liability. The two issues should not be confused by posing the question as whether the corporation may be "counted" as a conspirator to establish plurality.²¹¹

207. See text accompanying notes 60, 97-98 *supra*.

208. See, e.g., *United States v. Allied Chem. Corp.*, No. 76-0129, slip op. at 2 (E.D. Va. July 6, 1976) ("the effect of a charge of conspiracy as between Allied and its agents is, insofar as Allied is involved, a charge of conspiracy with itself").

209. See, e.g., *United States v. Consolidated Coal Co.*, 424 F. Supp. 577, 581 (S.D. Ohio 1976) ("The Court concludes then that a corporation can be charged with conspiring with its corporate personnel."); *United States v. Bridell*, 180 F. Supp. 268, 273 (N.D. Ill. 1960) ("Defendants also contend that there can be no conspiracy between a corporation and its officers."); *State v. Parker*, 114 Conn. 354, 364, 158 A. 797, 800 (1932) ("Another contention is that the corporation could not be a party to a conspiracy so that individuals could conspire with it . . .").

210. See notes 107-08 & accompanying text *supra*.

211. The utility of adopting such a two-step analysis to consider the plurality question has been endorsed by commentators investigating the same issue in antitrust and civil rights law. See *Barndt, supra* note 32, at 184 (stating that the question under the antitrust law is "whether a conspiracy can exist between the officers of a corporation acting among themselves in its behalf; and if so, whether the corporation can be held liable"); *Intracorporate Conspiracies, supra* note 38, at 487 (proposing a comparable two-part analysis for plurality in civil rights conspiracies).

In *United States v. Consolidated Coal Co.*,²¹² the indictment charged Consolidated Coal and eight of its agents with two conspiracies.²¹³ The company filed a motion to dismiss the indictment, arguing that "a corporation may not be charged or convicted of conspiring solely with its own employees."²¹⁴

Overruling the motion to dismiss, the court noted that the corporate defendant had cited only antitrust and civil conspiracy cases in support of its argument. The court found the Sherman Act cases "in-apposite" because they were based on the restraint of trade concept.²¹⁵ It found the civil cases involving conspiracies to induce breach of contract "inapplicable" because the fiction of the corporate entity does not protect individuals from criminal liability, even if it may protect them from contract liability.²¹⁶

The court next noted that, while no case had analyzed the precise question involved,²¹⁷ several cases considering criminal conspiracies had reached the same result, finding a conspiracy among a corporation and its agents. The court then cited several cases that did not discuss the specific issue, but did recognize implicitly that "a corporation can be prosecuted for conspiring with its corporate personnel."²¹⁸ Finally, the court reasoned that employment does not so merge an individual with a corporation that only one entity remains. When "separate indi-

212. 424 F. Supp. 577 (S.D. Ohio 1976).

213. Count I alleged a conspiracy to defraud the United States in its administration of the coal dust sampling program, and Count II alleged a conspiracy to violate the Federal Coal Mine Health and Safety Act. The indictment also included 170 counts of violating the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 819 (1976). 424 F. Supp. at 578-79.

214. 424 F. Supp. at 579.

215. *Id.*

216. *Id.* (quoting *United States v. Wise*, 370 U.S. 405, 417 (1962)). After reviewing *United States v. Carroll*, 144 F. Supp. 939 (S.D.N.Y. 1956), discussed in notes 162-69 & accompanying text *supra*, the court concluded that *Carroll* "must be read in light of its facts and limited to them." 424 F. Supp. at 580. The court's statement that *Carroll* must be "read in light of its facts" is true of most cases. The court's conclusion that *Carroll* must be "limited" to its facts is ambiguous. The court discussed the fact that the company in *Carroll* was dominated by the individual defendant, and then quoted a passage from *Carroll* explaining why conspiracy is not applied when only one person is involved. *Id.* As the court discussed both these factors, it is unclear which the court relied on as the persuasive distinguishing factor of *Carroll*. Probably the best approach is that *Carroll* is distinguishable from *Consolidated Coal* because *Carroll* involved only one person, and not because of any domination of the company by the individual. The court hinted at this result later in its opinion when it discussed the presence in *Consolidated Coal* of separate individual judgments. *Id.* at 581.

217. 424 F. Supp. at 580: "In researching this issue the Court did not find any case which analyzed the precise question presented herein."

218. *Id.* at 581 (citing *Nye & Nissen v. United States*, 336 U.S. 613 (1949); *United States v. Bridell*, 180 F. Supp. 268 (N.D. Ill. 1960); *United States v. Kemmel*, 160 F. Supp. 718 (M.D. Pa. 1958)).

vidual judgments" can be made by both a corporation and one or more employees, the corporation may be charged with conspiring with its employees.²¹⁹

The *Consolidated Coal* opinion offers several useful points of analysis. The court avoids the common difficulty of analogizing antitrust and civil rights conspiracy precedents to a criminal conspiracy case, but nevertheless frames the issue incorrectly. A corporation is liable only vicariously; it does not act on its own. Thus, the question is not whether the corporation conspired with its employees; rather, the question is whether the corporation is vicariously liable for the conspiracy among the several employees.

Even if the question is framed in terms of whether the corporation may be "counted" in determining plurality, framing the question in that manner causes confusion. If two or more agents are involved in the conspiracy, plurality is established whether or not the corporation is counted.²²⁰ When there is only a single individual involved, courts analyzing the issue have held that there is no plurality.²²¹ Moreover, even if the corporation were included to establish plurality, the conspiracy would still fail for lack of agreement.²²²

Criminal conspiracy cases indicate that multiple agents of a single corporation should constitute a plurality.²²³ This general rule conflicts with the plurality rule of conspiracy in other areas of law. In both antitrust and civil rights conspiracies, courts regularly hold that a conspiratorial plurality is *not* established by several agents of a single corporation.²²⁴ In some criminal conspiracies, courts have relied on

219. 424 F. Supp. at 581.

220. This point was recognized in *State v. Parker*, 114 Conn. 354, 364, 158 A.797, 800 (1932), in which the court stated that whether the corporation could be counted was academic because there were two individual defendants.

221. See, e.g., *Union Pacific Coal Co. v. United States*, 173 F. 737, 745 (8th Cir. 1909); *United States v. Carroll*, 144 F. Supp. 939, 942 (S.D.N.Y. 1956); *United States v. Santa Rita Store Co.*, 16 N.M. 3, 113 P. 620 (1911).

222. See notes 179-80 & accompanying text *supra*.

223. Only one case has held that multiple agents of a corporation cannot constitute a plurality. See *United States v. Allied Chem. Corp.*, No. 76-0129 slip op. (E.D. Va. July 6, 1976). In contrast, several courts have held that multiple agents may suffice for plurality. See, e.g., *American Medical Ass'n v. United States*, 130 F.2d 233, 253 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); *State v. Parker*, 114 Conn. 354, 364, 158 A.797, 800 (1932); *People v. Dunbar Contracting Co.*, 151 N.Y.S. 164, 166 (1914); *Standard Oil Co. v. State*, 117 Tenn. 618, 670, 100 S.W. 705, 718 (1907). See generally *Developments—Criminal Conspiracy*, *supra* note 2, at 951.

224. See, e.g., *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (antitrust); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (civil rights). See notes 165, 168, 201-02 & accompanying text *supra*.

antitrust and civil rights precedents.²²⁵ This reliance is unsound²²⁶ because the rule in those areas—that agents of a single company do not compose a plurality—reflects concerns of those particular substantive bodies of law. Specifically, the antitrust rule is designed to limit automatic antitrust liability for routine business decisions made within one company by parties who are not competitors,²²⁷ and the comparable civil rights rule is a response to a perceived need to limit the civil rights law to prevent it from becoming a general federal tort law.²²⁸

Instead of referring to inappropriate precedents from other substantive areas, the plurality definition for the general criminal law should be determined by analyzing which formula best serves the purposes of criminal conspiracy law. The main theme of criminal conspiracy laws is the presumption that an increased number of participants result in increased power and therefore in increased danger to society. A conspiracy is considered more powerful than an individual because multiple participants make more likely the achievement of the object of the conspiracy and less likely its detection, and because it allows the pursuit of complex criminal objectives. The law thus presumes that the collaboration of individuals increases the quality and quantity of danger to society.²²⁹

Arguably, however, this presumption may be inapplicable when the conspiracy occurs exclusively among agents of a single company in the course of employment. A corporation may have only a limited amount of power to exert; this power remains the same whether exercised by one or a number of its agents. For example, if the chief corporate counsel decides to understate corporate income on the corporate tax return, the danger to society is the same whether the counsel acts alone or conspires with the entire legal staff of the company.

225. See, e.g., *United States v. Allied Chem. Corp.*, No. 76-0129 slip op. (E.D. Va. July 6, 1976) (relying on antitrust and civil rights cases); *United States v. Kemmel*, 160 F. Supp. 718 (M.D. Pa. 1958) (relying on antitrust cases); *United States v. Carroll*, 144 F. Supp. 939 (S.D.N.Y. 1956) (same). See also *Developments—Criminal Conspiracy*, *supra* note 2, at 952.

226. *United States v. Consolidated Coal Co.*, 424 F. Supp. 577 (S.D. Ohio 1976), discussed in text accompanying notes 212-19 *supra*, has been the only case to recognize this explicitly. It described antitrust precedents as "inapposite" to the criminal case under decision. 424 F. Supp. at 579.

227. See text accompanying notes 45-47 *supra*.

228. See text accompanying notes 77-82 *supra*.

229. See notes 128-40 & accompanying text *supra*. See also Goldstein, *supra* note 130, at 414: "Under conspiracy law, on the other hand, all groups are conclusively presumed to render the proscribed object more attainable, the criminal intent more firmly held and the consequent imposition of additional punishment justifiable. Ordinarily, no effort is made to determine from the facts of each case or class of case the essential issue of whether society has more to fear from the plan of two than from the deed of one."

At a minimum, whether the power of the conspiracy and therefore the danger to society actually are increased by more people or remain constant in the intracorporate context depends on the specific employees and company involved, the industry structure, the criminal objective contemplated, and other such factors unique to each case. Thus, the presumption of increased danger may not be accurate when applied to conspiracies that are exclusively intracorporate. Ideally, each case should be examined individually to determine whether the facts warrant the conclusion that society faces more danger because of the participation of more than one agent.²³⁰ If the factual examination reveals that the power to harm society is increased by the participation of multiple agents, the agents should be deemed a plurality and held liable for conspiracy. In contrast, if the facts reveal no increase in the power to harm society resulting from the participation of more than one agent, the agents should not be defined as a plurality and no conspiracy charge should be upheld.

A finding that multiple agents of a single corporation can constitute a plurality may not serve some purposes of conspiracy law. Nevertheless, several dangers targeted for prevention by conspiracy law are present when multiple agents of a single corporation conspire. The members provide each other with mutual support, encouragement, and an education in criminal methods. The intracorporate conspiracy also can serve as a focal point for further crimes and produce general social tensions, dangers that the criminal conspiracy laws theoretically seek to prevent.

Therefore, while not all the dangers posed by conspiracies are present when the conspiracy is intracorporate, many of the dangers contemplated by criminal conspiracy law arise in that context. A case-by-case review of potential conspiracy dangers, however, would burden the courts with extensive factual investigation, and such review is likely to have results that are only slightly better than a fixed rule. On balance, therefore, the most useful analysis of intracorporate plurality is the current rule, which presumes an intracorporate conspiracy to be more harmful to society than individual action and so defines agents always to constitute a plurality.

Conclusion

Two areas of criminal law that have experienced a steadily expanding scope of liability are conspiracy and corporate liability. These

230. See Goldstein, *supra* note 130, at 461.

areas intersect on the issue of the plurality element of conspiracy when a single corporation's agent or agents are the conspirators. The first question is whether plurality is established between a single agent and the corporation. This question has not arisen under civil rights conspiracy law; under antitrust conspiracy law, plurality does not exist. Criminal conspiracy cases reach the same result: no plurality exists between a single agent and the corporation. This result best serves the theoretical purposes of the criminal conspiracy laws, and is consistent with conspiracy's requirement of agreement.

When two or more agents of a corporation are involved, questions of plurality persist, and the law is far from clear. Courts have been confused in articulating the issue. The question is not whether the corporation can be counted in determining plurality or whether the corporation conspired with itself or with its agents. Corporations are liable only vicariously for crimes, including conspiracy; therefore, a two-step inquiry is required. The courts should consider first whether the agents together compose a plurality: if so, they may be liable individually for conspiracy; if not, no conspiracy exists at all. If the agents are deemed to constitute a plurality, the second question is whether the standards of corporate criminal liability have been met. If they are not met, the corporation is not liable, even though the individual agents may be. On the other hand, if the standards of corporate criminal liability are met, the corporation is vicariously liable for the crimes of its agents, including their conspiracies. As this two-step analysis indicates, plurality and corporate criminal liability are separate issues.

The answer to the first inquiry, whether multiple agents of a single company are a plurality, varies depending on the type of conspiracy involved. Some courts have not noted the differences between criminal conspiracy and other conspiracies, and therefore have relied on inapposite decisions. Usually, in antitrust and civil rights conspiracies, several agents of a single company cannot constitute a plurality, yet they are a plurality for general criminal conspiracies. The antitrust and civil rights rules reflect concerns tailored to those respective bodies of law. Courts have used this limiting rule to avoid conspiratorial liability in situations that those substantive laws were not intended to reach. Such concerns do not apply to criminal conspiracy law, so an analysis of the criminal plurality rules should not rely on analogies to the plurality rules used in antitrust and civil rights.

The best approach is to analyze the criminal plurality rules with reference to the underlying purposes of criminal conspiracy law. The definition of multiple agents of a single corporation as a plurality serves

most, but not all, of the stated rationales of criminal conspiracy laws. On balance, therefore, defining multiple agents to be a plurality in the criminal context is the better rule.

